(13)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 115

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ONE FORD COUPE AUTOMOBILE, NO. 4776501, ALABAMA LICENSE NO. 10978, GARTH MOTOR COMPANY, CLAIMANT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1925
CERTIORARI GRANTED JUNE 1, 1925

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 473

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ONE FORD COUPE AUTOMOBILE, NO. 4776501, ALABAMA LICENSE NO. 10978, GARTH MOTOR COMPANY, CLAIMANT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

61501—25——1

s [Caption omitted.]

1 In United States District Court, Northern District of Alabama

Information

Filed Sept. 18, 1923

Before the Honorable W. I. Grubb, Judge.

On the eighteen day of September, A. D. 1923, comes C. B. Kennamer, as attorney of the United States for the said Northern District of Alabama, in a case of seizure on land under the internal revenue laws of the United States, and informs the court:

That Edgar N. Read, acting Federal prohibition director for the State of Alabama, heretofore, to wit, on the eleventh day of August, A. D. 1923, on land at Birmingham, in the county of Jefferson, within the Northern District of Alabama, and within the jurisdiction of said court did seize the following described property, automobile, goods, wares, and merchandise, to wit:

One Ford coupe automobile, motor number 4776501, bearing
2 Alabama license number 10978, which said automobile was then and there in the possession and under the control and custody of one Ed L. Killian and being used by him for the purpose of depositing and concealing certain illicit distilled spirits, to wit, twenty-seven quarts of Black and White and rye whiskey, said to belong to Garth Motor Company, a corporation, and now has the same in his custody within the said Northern District of Alabama, as forfeited to the United States for the following causes:

Petitioner avers that on, to wit, August 11th, 1923, at Birmingham, in the county of Jefferson, State of Alabama, and within the jurisdiction of this court, the said automobile aforesaid was then and there being used by the said Ed L. Killian for the purpose of depositing and concealing therein and therewith certain goods and commodities for or in respect whereof the taxes imposed by law had not been paid, to wit, twenty-seven quarts of illicit distilled spirit, to wit, whiskey, with intent then and there to defraud the United States of such taxes aforesaid or some part thereof.

That the said Ed L. Killian, so then and there having the possession and custody of said automobile aforesaid, was then and there using the said automobile for the purpose of depositing and concealing therein and therewith the said whiskey aforesaid, which said automobile then and there contained the said whiskey, and which said automobile was being then and there made use of for the purpose of containing, depositing, and concealing said whiskey, with the intent
and for the purpose of defrauding the United States of cer-
3 tain taxes theretofore imposed by law upon said illicit spirits aforesaid, wherefore this petitioner avers that all the casks, vessels, cases, and packages containing and which had contained such illicit spirits, respectively, and the said automobile aforesaid, and all things then and there used in connection therewith for the deposit and concealment of said illicit spirits, became and are forfeited to the United States under section 3450 of the Revised Statutes of the United States.

Petitioner attaches hereto and makes a part of this information the sworn affidavit and complaint of one R. A. Smith, a Federal prohibition agent for the State of Alabama.

4 In United States District Court

Bill of complaint

On this 13th day of August, 1923, at Birmingham, Ala., in said district and division, before Chas. J. Allison, for said district, comes R. A. Smith and upon his oath complains and says that Ed L. Killian, residing at 4110 5th Ave. S., Birmingham, on about August 11, 1923, at Birmingham, Ala., in the district and division aforesaid, did commit the following acts, to wit:

(1) Affiant states that said defendant did then and there unlawfully and knowingly manufacture a quantity of intoxicating liquor, to wit:_____otherwise than as authorized in the national prohibition act, that is to say, for intoxicating beverage purposes; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

(2) Affiant further states that at said time and place aforesaid, said defendant____herein named unlawfully did knowingly have and possess property, to wit_____

_____

designed for the manufacture of intoxicating liquor, to wit, whiskey, otherwise than as authorized by the national prohibition act.

(3) Affiant further states that at said time and place aforesaid said defendant____herein named unlawfully did knowingly_____

5

_____

then and there contained in_____

_____

otherwise than as authorized by the national prohibition act.

(4) Affiant further states that at said time and place aforesaid said defendant____ herein named unlawfully did knowingly have in possession for intoxicating beverage purposes certain intoxicating liquor, to wit, 27 quarts rye whisky of _____, then and there contained in 27 quart bottles, otherwise than as authorized by the national prohibition act.

All of which affiant saith on his oath aforesaid was and is contrary to the form of the statute in such case made and provided, to wit, section 29 of the national prohibition act.

Affiant states that J. P. Clements and R. A. Smith, Birmingham, Ala., are material witnesses to the subject matter of this complaint.

Wherefore, this complainant prays that said defendant____ may be apprehended and further dealt with according to law.

R. A. SMITH.

Subscribed and sworn to before me by the above-named R. A. Smith the day and year first written above.

[SEAL.] CHAS. J. ALLISON,
Clerk U. S. Court.

6 And the said attorney of the United States, on behalf of the United States, saith that all and singular the premises are true, and that by reason thereof and by force of the statutes in such case made and provided the aforementioned property, automobile, goods, wares, and merchandise as hereinbefore set forth became and are forfeited to the use of the United States as in said statutes provided.

Wherefore he prays that the usual process and monition of this honorable court may issue in this behalf against the said property, automobile, goods, wares, and merchandise, to enforce the forfeiture thereof, and to give notice to all persons concerned in interest therein to appear and show cause on the return day of said process why such forfeiture should not be decreed and that for the causes aforesaid, and others appearing, the said property, automobile, goods, wares, and merchandise, as hereinbefore set forth, be condemned by the definite sentence and decree of this honorable court as forfeited to the use of the United States, according to the form of the statutes in such cases made and provided.

C. B. KENNAMER,
United States District Attorney
for the Northern District of Alabama.

Leave granted to file the within, this 18th day of Sept., 1923.

W. I. GRUBB,
Dist. Judge.

7 In United States District Court

In the District Court of the United States for the Southern Division of the Northern District of Alabama

UNITED STATES OF AMERICA *vs.* ONE FORD COUPE AUTOMOBILE, MOTOR NO. 4776501, License No. 10978	In Equity No. 481

THE UNITED STATES OF AMERICA,
Northern District of Alabama.

Writ of attachment

Sept. 18, 1923

Chas. J. Allison, clerk

The President of the United States of America to the marshal of said district, greeting:

Whereas a libel has been filed in the District Court of the United States for the Southern Division of the Northern District of Alabama, on the 18th day of September, A. D. 1923, for the reasons

and causes in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in a certain Ford coupe automobile,
8 motor number 4776501, license No. 10978, against which said libel has been filed, may be sighted in general and special to answer the premises and, due proceedings being had, that the said Ford coupe automobile, motor No. 4776501, license No. 10978, may, for the causes in said libel mentioned, be condemned and sold to pay the demands of the United States, same being forfeited to the uses of the United States.

You are hereby commanded to attach the said Ford coupe automobile, motor No. 4776501, license No. 10978, which is now being held by Edgar N. Read, acting Federal prohibition director for the State of Alabama, and to detain the same in your custody until the further order of the court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, and especially the Garth Motor Company, a corporation, of Birmingham, Alabama, that they be and appear before the said court, to be held in and for the Southern Division of the Northern District of Alabama on the first day of December, A. D. 1923, at ten o'clock in the forenoon of that day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same and make their allegations in that behalf.

And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the Hon. W. I. Grubb, judge of the District Court
9 of the United States for the Northern District of Alabama, this the 18th day of September, A. D. 1923.

Issued this 18th day of Sept., A. D. 1923.

[SEAL.] CHAS. J. ALLISON,
Clerk, District Court of the United States for the Northern District of Alabama.

I have executed the within writ by handing a copy thereof to R. B. Doe, chief clerk to Edgar N. Reed, acting Federal prohibition director, also by handing a copy of same to M. P. Klyce, the assistant manager of the Ford Livery Co., the place where said automobile is stored, and by seizing and taking into my possession the said automobile herein described.

I have further executed same by publishing value of said seizure by me and of the date set for the hearing through in the Birmingham Age-Herald at least 14 days before said day of hearing, viz, Dec. 1, 1923.

This the 19th day of September, 1923.

THOS. J. KENNAMER,
U. S. Marshal.

By ROBT. A. MORRIS,
Deputy.

10 In United States District Court

Motion to quash

Filed December 6, 1923

Now comes the Garth Motor Company, a corporation, duly organized and existing under the laws of the State of Alabama, having its principal place of business at Birmingham, in said State, and intervenes as claimant in this cause and moves to quash the liable, the bases of the suit of the United States in this cause, and as grounds for said motion separately and severally says:

1. Since the enactment of the national prohibition act a suit can not be maintained under Rev. St. 3450 for forfeiture of a vehicle as having been used to remove and conceal distilled spirits
11 whereon a double tax has been imposed under said prohibition act with intent to defraud the United States of such tax.

2. Provisions of section 3450, Revised Statutes, for forfeiture of any vehicle used in the removal or concealment of a taxable commodity with the intent to defraud the United States of such tax is not applicable to the removal or concealment of intoxicating liquors since the national prohibition act became effective.

3. For that the forfeiture clause of section 3450, Revised Statutes, has been repealed by the national prohibition act.

4. For that sufficient facts are not alleged in said liable, filed by the United States in this cause, to authorize a forfeiture under section 3450 of the Revised Statutes.

5. The liable shows on its face that the person in possession of the said Ford automobile was not attempting to avoid the payment of tax, but on the contrary his intent was to engage in an unlawful business.

6. For that said liable fails to allege with sufficient certainty that the whisky stored in said automobile had been stored there for the purpose of defrauding the Government out of the tax due thereon.

7. For that there is no act of Congress imposing a tax on illicitly made whisky.

8. For that there is no tax imposed and due to the Government on the whisky mentioned in said libel.

WILLIAM S. PRITCHARD,
Attorney for Claimant, Garth Motor Company.

12 In United States District Court

Claim of Garth Motor Company

Filed April 14, 1924

STATE OF ALABAMA,
Jefferson County.

Personally appeared before me, the undersigned authority in and for said county, in said State, W. W. Garth, who is personally

known to me, and who, having been first duly sworn by me on oath, deposes and says:

That he is the president of the Garth Motor Company, a corporation, and as such is authorized to make this affidavit; that the title to that certain Ford coupe auomobile No. 4776501, which was heretofore on, to wit, August 11th, 1923, seized by the United States Government while in the possession of one Ed Killian and while being used by said Ed Killian in and about the unlawful transportation of intoxicating liquors, is in the said Garth Motor Company; that the title to said automobile is in the said Garth Motor Company under and by virtue of that certain title retaining instrument executed to said Garth Motor Company by one Urton Munn on, to wit, the 19th day of June, 1923, and duly recorded in the office of the probate judge of Jefferson County, Alabama, in volume 1252 of mortgages at page 64; that a copy of said instrument is attached hereto and made a part hereof; that the whole of the indebtedness due the Garth Motor Company, under and by virtue of
13 said instrument, has not been paid to the Garth Motor Company; and that attached hereto and made a part hereof are copies of the promissory notes, the evidence of said unpaid indebtedness.

W. W. GARTH.

Sworn to and subscribed before me this, the 24th day of August, 1923.

[SEAL.]

J. D. HIGGINS,
Notary Public.

BIRMINGHAM, ALA., 6–19–23.

This agreement certifies that I, Urton Munn, have this day purchased of Garth Motor Co., a corporation, the following property, to wit: One Ford coupe, No. 4776501, at and for the price of two hundred ninety-two dollars & 25/100 ($292.25), which property I agree to take and pay for upon the following terms and conditions: I agree to pay said Garth Motor Co. for said property said sum of $292.25 as follows: $125.00 cash on delivery and the balance in installments of $41.81 per month until the full purchase price with interest thereon is paid in full, said installments being evidenced by four promissory notes.

I do hereby consent and agree that the title to said property shall remain in and said property shall be and remain the property of said Garth Motor Company until fully paid for as above agreed, and that the execution of said notes or of notes hereafter
14 evidencing any balance unpaid herein, or of any renewal note, shall not, nor shall the acceptance, negotiation of, suit upon, or judgment rendered thereon, constitute, be, or be held as a waiver or relinquishment by said Garth Motor Company of said property or the title thereto or of any rights vested, created, or retained hereby. I further agree that I will not create, give, or

suffer to attach or be fixed against said property any lien of any kind, and I agree that I have no power or authority, either express or implied, to create or allow to arise or become a charge against said property any mechanic's, laborer's, or material man's lien, or to in any way render said property liable for or permit the same to be liable for or on account of any work upon or for any supplies or material furnished for use upon said property by any person, firm, or corporation other than said Garth Motor Company so long as this agreement remains in force and effect. I further agree that if I fail to pay any installment when due (time being essence of this contract) said Garth Motor Company, its agent or agents, shall have the right and privilege at any time thereafter to enter any premises where said property may be located to seize and take away such property, and I hereby release and waive all claims of every kind that I may have or claim to have growing out of or incident to the taking of said property by said Garth Motor Co., and I agree to forfeit and lose all previous payments made thereon, the same being treated as rents. I further agree to make all back payments in case said property is returned and to keep said property at No. 1900 11th Ave. S., Birmingham, Ala., and not to move the same, except in its use, without the consent of said Garth Motor Company. The right of exemption to personal property and wages under the constitution and laws of the State of Alabama or any other State of the United States is hereby waived in favor of the payment of this obligation, and the undersigned agree to pay all costs of collection, including a reasonable attorney's fee, and to keep said property insured in a reliable company, in a policy separate from any other property, for an amount of not less than $167.25 with loss, if any, payable to Garth Motor Company, as its interest may appear, and to pay all premiums and renewals on said policy until the indebtedness herein mentioned is paid in full, said policy to be taken out promptly on receipt of property and delivered to said Garth Motor Co., and that should I fail to do so then in the event of the loss, theft, or destruction of said property I shall remain liable for the full amount of the herein mentioned indebtedness. This constitutes the entire purchase contract, and upon the repossessing of said property or upon the failure of the undersigned to pay promptly said indebtedness all rights of the undersigned hereunder shall cease. No acceptance of any payment or part payment of said indebtedness shall be a relinquishment or impairment of any right of Garth Motor Company hereunder. A failure to pay in full any installment when due shall mature the entire indebtedness and render all installments immediately due and payable.

It is also agreed that in case the purchaser of the herein-described vehicle uses said vehicle or permits same to be used for the transportation of prohibited liquors, wines, or beers that the Garth Motor Company or its assigns shall then have the right to take possession of said vehicle on demand, and all property

or money that may have been paid as part of the purchase price on same shall be considered as liquidated damages and rent for the use of said vehicle. The purchaser agrees that in case of such violation on his part, directly or indirectly, that he or she will surrender the vehicle on request of the Garth Motor Company or its assigns without legal process.

It is further understood and agreed that I shall in no event allow, suffer, or permit the possession of said property to become or remain in any person or persons other than myself, and a breach of this stipulation shall entitle the Garth Motor Company to at once take possession of the said property and to demand payment of all deferred installments whether due or not and to work a forfeiture of previous payments, the same to be treated as rent as aforesaid.

It is further understood and agreed that the Garth Motor Company shall in no wise be bound by any warranty or guaranty made by any agent of said company with reference to said property. I further agree to pay the recording fees on this paper.

Witness my hand and seal this, the 19th day of June, 1923.

Witness:

(Signed by) JOHN W. BAKER.

(Signed by) URTON MUNN. [SEAL.]

17 THE STATE OF ALABAMA,
Jefferson County.

I hereby certify that the within instrument was filed in my office for record July 6, 1923, at ____ o'clock ____ m., and duly recorded in vol. 1252 of mtgs., page 64.

I hereby certify that the record tax to the amount of $.30 has been paid on this instrument.

(Signed) J. P. STILES,
Judge of Probate.

I hereby certify that the privilege tax required by law to be paid on this instrument was paid by the lender.

Given under my hand this the 6th day of July, 1923.

(Signed) GARTH MOTOR COMPANY.
By H. HIRST.

$41.81 BIRMINGHAM, ALA., *June 19, 1923.*

On or before August 19, 1923, after date, I, we, or either of us, promise to pay to Garth Motor Company, Incorporated, or order, forty-one & 81/100 ______ dollars, with interest at the rate of 8 per cent per annum, both before and after maturity, and reasonable attorney's fee (if allowed by law), if placed in the hands of an attorney for collection. Value received without any relief whatever from valuation or appraisement laws. The makers, endorsers, sureties, and guarantors severally waive presentment for payment, protest, and notice of protest and nonpayment of this note, and all defenses on account of any extension or extensions of time for pay-

ment that may be given to them or any of them by the
18 holder or holders of said note, or any renewal note for whole or part hereof, and do hereby relinquish the benefit of all exemption and insolvency laws.

This note is the second of a series of four notes, bearing even date, and is given in accordance with the terms of a conditional sale contract existing between the same parties.

Negotiable and payable at _____ Bank _____
(City)
with exchange on New York or Chicago.

(Signed) URTON MUNN.

$41.81 BIRMINGHAM, ALA., *June 19, 1923.*

On or before September 19, 1923, after dated, I, we, or either of us promise to pay to Garth Motor Company, Incorporated, or order forty-one & 81/00 _____ dollars, with interest at the rate of 8 per cent per annum, both before and after maturity, and reasonable attorney's fee (if allowed by law), if placed in the hands of an attorney for collection. Value received without any relief whatever from valuation or appraisement laws. The makers, endorsers, sureties, and guarantors severally waive present for payment, protest, and notice of protest and nonpayment of this note, and all defenses on account of any extension or extensions of time for payment that may be given to them or any of them by the holder
19 or holders of said note, or any renewal note for whole or part hereof, and do hereby relinquish the benefit of all exemption and insolvency laws.

This note is the third of a series of four notes, bearing even date, and is given in accordance with the terms of a conditional sale contract existing between the same parties.

Negotiable and payable at _____ Bank _____
(City)
with exchange on New York or Chicago.

(Signed) URTON MUNN.

$41.82. BIRMINGHAM, ALA., *June 19, 1923.*

On or before October 19, 1923, after date, I, we, or either of us promise to pay to Garth Motor Company, Incorporated, or order forty-one & 82/100 _____ dollars, with interest at the rate of 8 per cent per annum, both before and after maturity, and reasonable attorney's fee (if allowed by law), if placed in the hands of an attorney for collection. Value received without any relief whatever from valuation or appraisement laws. The makers, endorsers, sureties, and guarantors severally waive presentment for payment, protest, and notice of protest and nonpayment of this note, and all defenses on account of any extension or extensions of time for payment that may be given to them or any of them by the holder or holders of said note, or any renewal note for whole or part hereof, and do hereby relinquish the benefit of all exemption and insolvency laws.

20 This note is the fourth of a series of four notes, bearing even date, and is given in accordance with the terms of a conditional sale contract existing between the same parties.

Negotiable and payable at ---------- Bank ----------
(City)
with exchange on New York or Chicago.

(Signed) URTON MUNN.

21 In United States District Court

Order sustaining motion to quash

Filed April 14, 1924

[Title omitted.]

This cause coming on to be heard on this the 14th day of April, 1924, come the United States of America, by district attorney, cometh also the Garth Motor Company, a corporation, claimant to one Ford coupe automobile, motor number 4776501, Ala. license No. 10978, and the said claimant files herein a motion to quash the libel of information heretofore filed against said automobile by the United States of America in this action.

After argument of counsel and the court being fully advised and understanding said motion to quash, it is by the court.

Ordered, adjudged, and decreed that the said motion to quash be, and the same hereby is, sustained and the libel of information heretofore filed is hereby quashed and dismissed, to which action of court libellant then and there duly excepted.

22

It is further ordered, adjudged, and decreed that the said claimant be, and it hereby is, awarded the custody of the said aforesaid automobile.

It is further ordered, adjudged, and decreed by the court that the United States of America be taxed with the costs of this proceeding, and that all charges and fees for the storage of said automobile, since the same was taken possession of by the marshal, be paid by the Government.

This the 14th day of April, A. D. 1924.

W. I. GRUBB,
District Judge.

23 In United States District Court

Replevy bond

Filed April 14, 1924

[Title omitted.]

We, Garth Motor Company, agree to pay to the United States of America the sum of one hundred fifty and no/100 dollars, and for the payment of such sum we bind ourselves, and each of us, and each

of our heirs, executors, and administrators, jointly and severally; and as against this bond and all proceedings thereon we and each of us waive all rights of exemption allowed us under the constitution and laws of the State of Alabama or any other State of the United States.

Sealed with our seals and dated this the 27th day of December, 1923.

The condition of the above obligation is such that on the 11th day of August, 1923, under the provisions of the national prohibition act, there was seized the property described as follows, to wit: One Ford coupe automobile, motor number 4776501, used in violation of the law in transporting intoxicating liquors, such seizure being
24 made by U. S. marshal, and possession being taken of such property under and by virtue of the provisions of section 26, Title II, of the said national prohibition act, and the above-bound Garth Motor Company having made claim to said property seized and asked for the return of the same to his possession, and said property being worth approximately one hundred fifty and 00/100 dollars:

Now, therefore, if the said Garth Motor Company, who claims to be the owner of the said seized property, shall well and safely keep said property and shall return the said property to the custody of the U. S. marshal for Northern District of Alabama, or such other of his agents as he may designate, in as good condition and free from harm or depreciation as when received, on the day of the trial to await the judgment of the court in said cause, then this bond to be void, otherwise to be in full force and effect.

In witness whereof we have hereunto set our hands and seals this the 27th day of December, 1923.

GARTH MOTOR COMPANY, INC.,
W. W. GARTH, *President.*

Approved this 14th day of April, 1924.

W. I. GRUBB,
U. S. District Judge.

25 In United States District Court

Petition for appeal

Filed April 14, 1924

[Title omitted.]

The United States of America, libellant in the above-styled cause, respectfully shows unto your honor that a decree was rendered and entered in the above-entitled cause on the 14th day of April, 1924, sustaining the motion to quash said libel of information and dismissing and quashing the said libel of information and awarding the

custody of said aforesaid automobile to the custody of the claimant herein.

And now the said United States of America feeling ag-
26 grieved by the said decree of this honorable court, rendered and entered in said cause as aforesaid, hereby petitions the court to enter an order in said cause requiring the said claimant to give bond for the release of said automobile to it and to allow your petitioner to prosecute an appeal from said decree to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignments of error filed herewith, and prays that this bill be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings, and documents and evidence upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Fifth Circuit, under the rules of said court in such case made and provided.

And your petitioner further shows that it is the United States of America, a Government sovereign, and should not be required to give bond or security for said appeal.

THE UNITED STATES OF AMERICA,
By C. B. KENNAMER,
U. S. Attorney for Northern District of Alabama.

27 In United States District Court

Assignment of errors

Filed April 14, 1924

[Title omitted.]

The United States of America, libellant in the above-styled proceedings, conceiving themselves aggrieved by the decree of this court rendered on the 14th day of April, 1924, sustaining the motion of the claimant to quash the libel of information filed herein, hereby files the following assignments of error on appeal from said decree of this court.

(1) The court erred in sustaining the motion to quash the libel of information filed in this cause.

28 (2) The court erred in awarding the custody and possession of said automobile, sought to be condemned and forfeited, to the claimant, Garth Motor Company.

(3) The court erred in dismissing the libel of information filed herein.

This the 14th day of April, 1924.

C. B. KENNAMER,
United States Attorney.

Presented April 14, 1924.

W. I. GRUBB, *Judge.*

29 In United States District Court

Order allowing appeal

Filed April 14, 1924

[Title omitted.]

The United States of America, libellant in the above styled cause, having this day presented their petition for appeal from the decree of this court sustaining motion to quash the libel filed in said cause to the United States Circuit Court of Appeals for the Fifth Circuit, and that said automobile be released to the claimant only upon the execution of satisfactory bond therefor by the claimant, pending appeal, this court having fully and duly considered the same, it is hereby ordered that the said appeal be allowed, and that no bond or security be given by the United States for said appeal, and it is further ordered by the court that the marshal of this court

30 retain the possession and custody of said automobile until the execution of a bond in the sum of $150.00 be executed by the claimant. Upon the execution and approval of such bond by this court, the marshal will deliver said automobile to the custody and possession of the claimant herein, as ordered in the order of this court sustaining the motion to quash the libel in this cause.

This the 14th day of April, A. D. 1924.

W. I. GRUBB,
District Judge.

31 In United States District Court

Marshal's return

Bond in the sum of $150.00 in this case having been duly executed, as provided herein, and said bond having been approved by the court, the automobile described herein has been released to the Garth Motor Co., claimant herein, as directed in and by said order.

This 14th day of April, 1924.

THOS. J. KENNAMER,
U. S. Marshal.
By ROBT. A. MORRIS,
Deputy.

32 [Citation in usual form showing service on William S. Pritchard omitted in printing.]

33 In United States District Court

Clerk's certificate

THE UNITED STATES OF AMERICA,
Northern District of Alabama.

I, Chas. J. Allison, clerk of the District Court of the United States for the Northern District of Alabama, do hereby certify that

the foregoing pages numbered from one (1) to thirty-two (32), both inclusive, is a full, true, and correct transcript of the record in the matter of the United States of America, appellant, vs. One Ford Coupe Automobile, Motor No. 4776501, Alabama License No. 10978, Garth Motor Company, complainant, appellee, as fully as the same appears of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Birmingham, in said district, on this the 19 day of June, A. D. 1924.

CHAS. J. ALLISON,
Clerk United States District Court,
Northern District of Alabama.

34 In United States Circuit Court of Appeals

Argument and submission

October 21, 1924

[Title omitted.]

On this day this cause was called, and after argument by Jim C. Smith, assistant United States attorney, for appellant, and John D. Higgins, Esq., for appellee, was submitted to the court.

35 In United States Circuit Court of Appeals, Fifth Circuit

No. 4372

THE UNITED STATES OF AMERICA, APPELLANT
versus
ONE FORD COUPE AUTOMOBILE, MOTOR NO. 4776501, ALABAMA LICENSE NO. 10978; GARTH MOTOR COMPANY, claimant, appellee

Opinion

Filed February 27, 1925

C. B. KENNAMER, U. S. Atty., JIM C. SMITH, Asst. U. S. Atty., for appellant.

WM. S. PRITCHARD, JOHN D. HIGGINS, for appellee.

Before WALKER and BRYAN, Circuit Judges, and ESTES, District Judge.

BRYAN, Circuit Judge:

This is a libel of information under R. S. §3450 for the forfeiture of an automobile. The facts relied on by the Government are that one Killian had the automobile in his possession and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled, with the intent to defraud the United States of its internal-revenue tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title until

36 the purchase price should be paid, of which, at the time the libel was filed, there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed, the sale was innocently made to another person. The District Court dismissed the libel.

The case is one at law, and should have been brought here for review by writ of error, instead of by appeal, as was done; but that is unimportant, and we proceed to the merits. Act of Sept. 6, 1916, 39 Stat. 727.

Counsel for the Government make an elaborate and exhaustive argument to establish the proposition that the tax on intoxicating liquors, although the manufacture thereof is prohibited by the national prohibition act, has never been replaced, or if so, that it has been reinstated by §5 of the act of Nov. 23, 1921, 42 Stat. 223, which provides "that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the national prohibition act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the national prohibition act or of this act," etc. The proposition contended for finds support in the cases of United States v. Yuginovich, 256 U. S. 450, and United States v. Statoff, 260 U. S. 477, and may be conceded.

It is also contended that an automobile may be forfeited according to the provisions of §3450 when used for the deposit or concealment of liquor illicitly distilled and intended for use as a beverage, with intent to defraud the United States of the tax thereon, and that §26 of the national prohibition act is not in conflict, be-

37 cause it only applies to an automobile used in the removal or transportation of liquor. Where a forfeiture occurs under §3450 the interest of an innocent owner or lien holder is lost. United States v. Mincey, 254 Fed. 287; Logan v. United States, 260 Fed. 746; Goldsmith-Grant Co. v. United States, 254 U. S. 505; whereas in cases falling under §26 of the national prohibition act the rights of innocent owners or lien holders are preserved. The position now taken by the Government in this case is that the interest of an innocent owner or lien holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice, for under it, as an illustration, the interest of an innocent holder of a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by some one who had the intent to defraud the Government of its internal revenue tax.

Section 3450 is superseded by §26 of the national prohibition act in so far as there is a conflict between the two. United States v. One Haynes Automobile, 274 Fed. 926. The former section applies

to any goods or commodities upon which a tax is imposed, whereas the latter deals only with intoxicating liquor. An automobile actively engaged in transporting goods is at least as well adapted to facilitate violations of the revenue law as is one which is used merely for the deposit or concealment of goods. §2450, correctly construed, makes a distinction between an automobile standing still and one in motion, we are of opinion that §26 of the national prohibition act operates to supersede it in so far as the forfeiture of automobiles and other vehicles, and air and water craft, used in the han-
38 dling of liquor, is concerned. The latter section deals with the subject of the unlawful possession as well as the unlawful transportation of intoxicating liquor. It prescribes such penalties on the subject with which it deals as were deemed adequate. Where the seizure is one within its terms, the seizing officer has no option or election as to the forfeiture proceeding to be pursued, but is required to follow the procedure prescribed in that section. Language used in that section indicates that the applicability of the forfeiture provision therein contained was not intended to be dependent upon the seized vehicle being actually engaged in transporting intoxicating liquor when the seizure was made. That the forefeiture provision therein contained was intended to be applicable when the seized vehicle, at the time of its seizure, was used as a means of possessing intoxicating liquor, whether such liquor was or was not then being actually transported, is indicated by the fact that that forfeiture provision is immediately associated with the provision contained in the second sentence of that section: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team or automobile, boat, air, or water craft, or any other conveyance, and shall arrest any person in charge thereof." The just-quoted language, in the connection in which it is used, is inconsistent with the existence of an intention to deal only with intoxicating liquors while being actually transported. It can not well be inferred that an automobile which was seized while it was being used as a means of possessing intoxicating liquors was intended to be forfeitable otherwise than under the provision of §26 of the national prohibition act if
39 the transaction also involved the feature of concealing such liquor. A special forfeiture provision being applicable in the case of a vehicle used in possessing intoxicating liquor, in such case another forfeiture provision applicable generally to anything used, with intent to defraud the United States of a tax, for the deposit or concealment of the subject of the tax, can not be resorted to.

The conclusion is that Congress, when it enacted the national prohibition act, considered the forfeiture provision of §3450, which failed to protect an innocent interest in the thing forfeited, too severe, and therefore provided a less drastic penalty which safeguards such interest.

The judgment is affirmed.

40 In United States Circuit Court of Appeals

Judgment

Feb. 27, 1925

[Title omitted.]

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed.

41 In United States Circuit Court of Appeals

Clerk's certificate

I, Frank H. Mortimer, clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 34 to 40 next preceding this certificate contain full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said court, numbered 4372, wherein the United States of America is appellant and Garth Motor Company, claimant, etc., is appellee, as full, true, and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 33 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals at my office in the city of New Orleans, Louisiana, in the fifth circuit, this 11th day of April, A. D. 1925.

[SEAL.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

42 Supreme Court of the United States

Order allowing certiorari

Filed June 1, 1925

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the

proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

It is further ordered that this cause be, and the same is hereby, advanced and assigned for argument on the summary docket on Monday, November 2d next, after the cases heretofore assigned for that day.

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PETITIONER
v.
ONE FORD COUPE AUTOMOBILE, No. 4776501, Alabama license No. 10978, Garth Motor Company, claimant } No. —

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered on February 27, 1925, affirming an order of the District Court sustaining a motion to quash the libel filed in the above-entitled cause.

STATEMENT

The libel was filed by the Government in the United States District Court for the Northern

District of Alabama against the above-described automobile for the forfeiture thereof under the provisions of Section 3450 of the Revised Statutes of the United States.

The libel alleged that the automobile was in the possession of and under the control and custody of one Killian, and was "then and there being used by the said Ed L. Killian for the purpose of depositing, and concealing therein and therewith certain goods and commodities for or in respect whereof the taxes imposed by law had not been paid, to wit, twenty-seven quarts of illicit distilled spirit, to wit, whisky, with intent then and there to defraud the United States of such taxes aforesaid or some part thereof." (R. 2.)

Respondent Garth Motor Company intervened in the case, claiming ownership of the car in question under a "certain title-retaining instrument" executed to said Garth Motor Company by one Urton Munn and duly recorded. (R. 12.) The Government did not challenge respondent's statement that the automobile had been sold to Munn under contract for deferred purchase price payments upon the condition that the title remain in the seller until the full purchase price was paid, and that the whole of the purchase price had in fact not been paid.

A motion to quash the libel was filed by the respondent Motor Company, which motion was sustained by the District Court. (R. 21.) The

order of the District Court was affirmed by the Circuit Court of Appeals.

QUESTION PRESENTED

The question presented is whether Section 3450, Revised Statutes, is available to the Government for the forfeiture of a vehicle used in the removal or concealment of a taxable commodity—whisky—since the enactment of the National Prohibition Act (Chap. 85, 41 Stat. 305) and the Act Supplemental thereto (Chap. 134, 42 Stat. 222).

STATUTES INVOLVED

Section 3450, Revised Statutes, provides, in part, as follows:

> Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, * * * are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, * * * shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited.

Section 26, Title II, of the National Prohibition Act, reads, in part (41 Stat. 315):

Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the

proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court of Appeals erred in holding that Section 3450, Revised Statutes, is no longer in force and effect and that it has been superseded by the National Prohibition Act.

2. The decision is detrimental to the interests of the Government in the enforcement of the National Prohibition Act, for the reason that Section 3450, Revised Statutes, has been generally and effectively employed in preventing the unlawful traffic in intoxicating liquors by forfeiting the vehicle or other means of transportation.

3. It is important that this Court pass upon the question whether Section 3450, Revised Statutes, is still available to the Government for the forfeiture of a vehicle used in the removal or concealment of a taxable commodity.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

JAMES M. BECK,
Solicitor General.

BRIEF IN SUPPORT OF THE PETITION

The enforcement of the National Prohibition Act had not been long in progress until it was discovered that Section 26 of Title II thereof, providing for the seizure and forfeiture of vehicles used in the illicit transportation of intoxicating liquor was in its operation impracticable in many respects, because of its provisions authorizing the delivery of seized vehicles to claimants thereof upon execution by them of bonds for the return of the vehicles at the time of trial to abide the judgment of the court; because of the forfeiture being made dependent upon the conviction of the defendants in criminal prosecutions against them; and because of the opportunity afforded third-party claimants to come in and establish ownership in the vehicles or to assert bona fide liens against the proceeds from the sales thereof. These equitable provisions of the statute defeated its very purpose. Persons engaging in illicit traffic in intoxicating liquors were able to cover up their ownership or interest in the vehicle and save it from forfeiture by mortgaging the same, or, in some instances, by arranging with confederates, against whom no wrongdoing could be proved, to come in as claimants and rescue the seized property. The instant case affords an example of the

arrangement usually entered into for the purpose of defeating the statute. The bootlegger, as a rule, when purchasing an automobile makes but a small initial payment and arranges for small monthly payments, so that if his interest in the car is forfeited his loss will be kept at a minimum. Moreover, the requirement that the defendant must first be convicted on a criminal charge before the vehicle can be forfeited has resulted in great delays, the accumulation of expensive storage charges, and the congestion of court dockets.

For these reasons the Government adopted the policy of forfeiting vehicles under Section 3450, Revised Statutes, whenever it was practicable and possible to do so. It was found that Section 3450, Revised Statutes, afforded a much more summary and effective procedure in that it did not give interveners an opportunity to come in and defeat the forfeiture and did not depend upon a criminal conviction, but effected prompt dispatch of cases brought thereunder and consequential relief of the dockets. Under this statute the *res* is considered the offender and third party claimants are not privileged to intervene.

This procedure on the part of the Government gave rise to a contrariety of opinions in the courts below, although the Circuit Courts of Appeals now generally hold that Section 3450, Revised Statutes, has been superseded by Section 26, Title II, of the National Prohibition Act. The contentions usually

advanced against the applicability of Section 3450, Revised Statutes, are as follows:

> 1. That Section 26, Title II, of the National Prohibition Act, providing a complete procedure and a less drastic method for dealing with vehicles used in transporting liquor, impliedly repeals and supersedes said Section 3450.
>
> 2. That Section 3450 no longer applies to the transportation of illicit spirits or intoxicating liquors because all prohibition and regulations relative to such liquors are comprehended in the National Prohibition Act.
>
> 3. That intoxicating liquors intended for beverage purposes are not subject to tax and therefore Section 3450 has no application.

In the instant case the court below concedes that intoxicating liquors are still taxable, although their manufacture is prohibited, citing *United States* v. *Yuginovich*, 256 U. S. 450, and *United States* v. *Stafoff*, 260 U. S. 477. But notwithstanding this, it held that an automobile used for the deposit and concealment of illicitly distilled liquor, with intent to defraud the United States of the tax thereon, could not be forfeited under the provisions of Section 3450, Revised Statutes, because, there being a conflict between the two statutes, Section 3450 was superseded by Section 26 of the National Prohibition Act, and the Government was restricted to the use of the

latter. In this, the Government submits, the court erred.

Section 3450, Revised Statutes, in so far as it relates to vehicles used to *deposit* or *conceal* distilled spirits, was not repealed by Section 26, Title II, National Prohibition Act, which appears to be limited in scope to vehicles in motion, and does not cover the whole subject matter of Section 3450. The objects of the two statutes are not the same, the former being a law in aid of the revenue, the latter being confined to suppressing the transportation of intoxicating liquor for beverage purposes and contemplating situations only in which the driver is apprehended, which driver must be convicted before the court is authorized to render judgment condemning the car. See *United States* v. *Claflin,* 97 U. S. 546; *United States* v. *Tynen,* 11 Wall. 88; *United States* v. *Stowell,* 133 U. S. 1.

General laws relating to internal revenue are not affected or superseded by subsequent laws unless the contrary clearly appears. *United States* v. *Barnes,* 222 U. S. 513. The National Prohibition Act levies no taxes: therefore it can not as a taxing statute supersede any of the revenue statutes. Section 35, Title II, imposes *penalties* but not taxes. It provides punishment for unlawful conduct rather than a means for obtaining revenue. *Lipke* v. *Lederer,* 259 U. S. 557; *Regal Drug Corporation* v. *United States,* 260 U. S. 386; *Fontenot* v. *Accardo,* 278 Fed. 871; *United States* v. *One Essex Coupe,* 291 Fed. 479.

Section 3450 is a law passed in the interest of the revenue to punish tax evaders; Section 26 was enacted in the interest of prohibition to punish evaders of the National Prohibition Act. The objects of the two statutes are different, the subject matter thereof largely different and the *modus operandi* very different. Section 3450 affects only untax-paid liquors. Section 26 is not at all concerned about the payment of taxes on liquor. Section 3450 operates on a vehicle not in motion. Section 26 operates principally on vehicles while in motion and the forfeiture can not be completed until the driver has been convicted. Section 3450 provides no redress for innocent third parties having an interest in the seized property, whereas Section 26 provides equitable means for third-party claimants to come in and establish their claims to the property or their liens against the proceeds from the sale thereof.

Many of the courts holding against Section 3450 seem to be influenced, as apparently was the court below, by a consideration that the provisions of Section 3450 are too severe and that therefore the less drastic penalties of Section 26, which protect an innocent interest, should be applied. But this is no criterion on which to hold Section 3450 inapplicable if the case otherwise comes within the statute, especially when, as above pointed out, procedure under Section 26 is ineffectual. The Government had a right to elect to rely on Section

3450, instead of Section 26, for the forfeiture of the vehicle here involved.

It is also argued that the removal, deposit, and concealment referred to in Section 3450 have reference to a fixed place of manufacture, storage, and assessment of the tax, and can not be distorted to apply to such transportation as is met in prohibition enforcement, where the operator of the vehicle does not have in mind the avoidance of a tax, but is endeavoring to avoid the prohibitions of the National Prohibition Act. For this reason, it is said, Section 3450 is inapplicable. The Government submits, however, that the considerations above set forth refute such a construction of the statute. Intoxicating liquors have always been subject to tax and Section 3450 has always been an effective weapon in enforcing taxing statutes, and is still available as such. In the instant case the charge is not that the car was being used to remove, but was being used to deposit and conceal distilled spirits with intent to evade taxes.

If there is a tax on illicitly distilled spirits, which has been conceded by the court below, and Section 3450 has not been repealed or superseded by the National Prohibition Act and the Act Supplemental thereto, there is no question that the Government was entitled to a forfeiture of the automobile involved in this case, irrespective of whether or not the claimant who sold it and retained title thereto had knowledge of its unlawful

use. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *United States* v. *Mincey,* 254 Fed. 287; *United States* v. *One Saxon Automobile,* 257 Fed. 251; *United States* v. *One W. W. Shaw Automobile Taxi, etc.,* 272 Fed. 491, affd. 281 Fed. 669.

In the *Goldsmith-Grant case,* decided by this Court, the facts were similar to those in the present case. It involved a libel proceeding brought under Section 3450 for the forfeiture of an automobile used prior to the adoption of the National Prohibition Act in the removal, deposit, and concealment of nontax-paid spirits. The vehicle was being operated by the purchaser. The Goldsmith Company intervened as owners under the terms of a conditional sale contract by which they had reserved title until completion of payment of the purchase price. They were in fact innocent of the unlawful use of the car and alleged that the taking of their property would be a violation of the Fifth Amendment. But this Court held that Congress in enacting this statute treated the *res* as the offender and in providing so arbitrary a rule took into account the interests of the Government, its revenues and policies. This case was decisive as to the force and effect of Section 3450 in cases of removal and deposit and concealment of nontax-paid intoxicating liquors. Whether the same rule would be applied to cases where the vehicle was operated by one who had stolen it, or was in possession of it without the express or implied consent of the owner, was not determined.

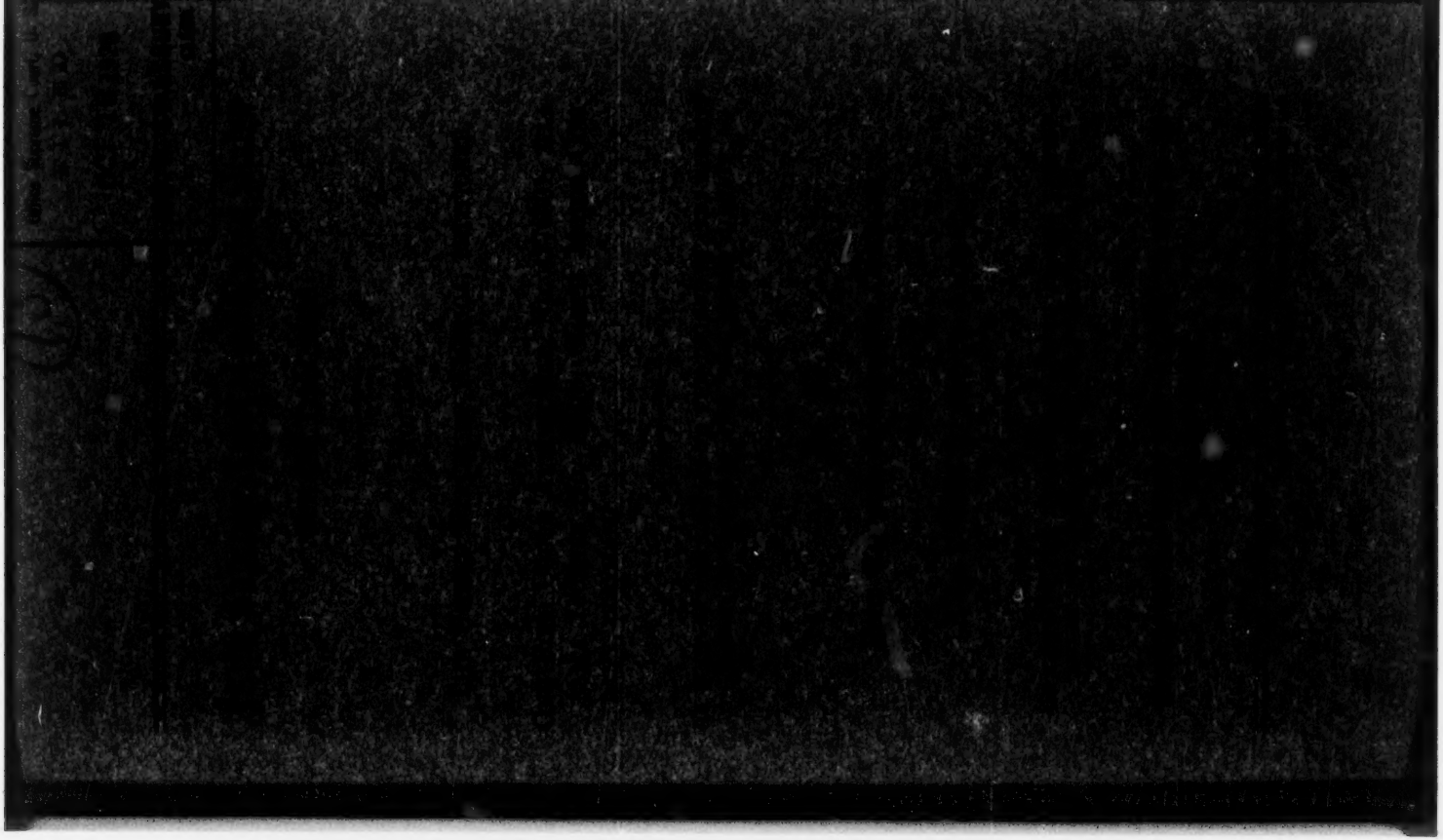
While the case just cited was decided after the adoption of the National Prohibition Act, it arose before national prohibition became effective. It is important to the proper enforcement of the revenue laws and the National Prohibition Act that the Government know whether the above decision with respect to Section 3450 is applicable to a case which, like the present, arose after the enactment of the National Prohibition Act and Act Supplemental thereto, or whether, as held by the court below, said section has been superseded by Section 26, Title II, of the National Prohibition Act, and the Government is therefore compelled to proceed under the latter.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the writ herein applied for should be granted.

JAMES M. BECK,
Solicitor General.
MABEL WALKER WILLEBRANDT,
Assistant Attorney General.
BYRON M. COON,
Special Assistant to the Attorney General.

MAY, 1925.



INDEX

AUTHORITIES CITED

14958—26——1

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 115

THE UNITED STATES OF AMERICA, PETITIONER

v.

ONE FORD COUPE AUTOMFBILE, No. 4776501, ALABAMA License No. 10978, Garth Motor Company, claimant

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 173

PORT GARDNER INVESTMENT COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

OPINIONS BELOW

In No. 115, *The United States* v. *One Ford Coupe*, the opinion of the Circuit Court of Appeals (R. 14)

is reported in 4 F. (2d) 528. In No. 173, *Port Gardner Investment Company* v. *The United States,* there is no opinion below, as the case was certified.

JURISDICTION

In No. 115, the *Ford Coupe case,* the judgment of the Circuit Court of Appeals was entered February 27, 1925. (R. 17.) On May 25, 1925, the United States applied for a writ of certiorari under Section 240 of the Judicial Code. The writ was granted June 1, 1925.

No. 173, the *Port Gardner Investment Company case,* is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925. (C. 229, 43 Stat. 936, 938.)

STATEMENT

Without attempting to present anything not covered by the briefs already filed, it is not out of place on reargument to make a summary review of these cases.

Both cases deal with liquor illicitly distilled. In each case the United States seeks forfeiture of the automobile in which the illicit spirits were being removed and transported, under the provisions of Section 3450 of the Revised Statutes, which provides for the forfeiture of a vehicle used to remove and conceal goods or commodities on which a tax has been imposed, with intent to defraud the Government of the tax.

In the *Port Gardner case* it appears that the man using the automobile to transport the illicit liquor was arrested, charged with possession and transportation of intoxicating liquor in violation of the National Prohibition Act, pleaded guilty and was sentenced to pay a fine, and that the Government then sought forfeiture of the automobile under Section 3450 of the Revised Statutes, under which the interests of innocent parties are not saved, instead of under Section 26 of the National Prohibition Act, under which innocent interests are not forfeited.

In the *Ford Coupe case* the record does not disclose that any individual had been prosecuted or convicted either for violation of the National Prohibition Act or for the offense of attempting to defraud the United States of taxes under Section 3450 and the accompanying sections of the Revised Statutes. The record does not affirmatively show that no such prosecution was had. It is silent on the subject.

The motion to quash the libel in the *Ford Coupe case* (R. 5) does not plead a conviction under the National Prohibition Act as a bar to the forfeiture under Section 3450.

THE QUESTIONS PRESENTED

Each case presents the question whether there is such direct conflict between the National Prohibition Act and Section 3450 of the Revised Statutes [or any other provision of law on which forfeiture

by Section 3450 depends] as to make Section 3450 [which provides for forfeiture of a vehicle used in removing merchandise for the purpose of defrauding the United States of the taxes thereon] inoperative in cases where illegally distilled liquors, on which no tax has been paid, are being removed. In that connection the question arises whether there is any tax on liquors illicitly distilled, within the meaning of Section 3450. A question of secondary importance—which arises only in the *Port Gardner Investment Company case,* No. 173—is whether the conviction of the individual using an automobile for illegally transporting liquor in violation of the National Prohibition Act is a bar to any proceeding by the United States to forfeit the vehicle under Section 3450 and requires the United States to proceed, if at all, to forfeit the vehicle under Section 26 of the National Prohibition Act. If a forfeiture may be had under Section 3450 for use of a vehicle to evade a tax on illicitly distilled liquor, the interests of innocent persons in the vehicle are not saved. If Section 26 of the National Prohibition Act is the only applicable provision for forfeiture of the car, the interests of those who are innocent are not forfeited.

THE STATUTES

The principal statutes involved are set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

I. By the Supplemental Act of November 23, 1921, Congress disclosed an unmistakable intention

to maintain in operation with respect to spirits illegally distilled in violation of the National Prohibition Act all laws imposing or regarding taxes on spirits produced in the United States and all laws imposing penalties for nonpayment or evasion, except to the extent the old laws are in direct conflict with the National Prohibition Act.

The Revenue Act of 1918, amended in 1921, imposing a tax on all spirits thereafter produced, is a law regarding taxes on liquors, and Section 3450 of the Revised Statutes, providing for forfeiture of vehicles used to remove taxed articles to defraud the revenue, is a law providing a penalty for evasion of a tax within the meaning of Section 5 of the Supplemental Act.

There are, and have been since the Supplemental Act, what are in truth taxes imposed on liquor illegally distilled, and there are additional imposts on such liquor which are penalties, but which Congress has treated as taxes. There are, therefore, taxes on illicitly produced liquor within the meaning of Section 3450 of the Revised Statutes authorizing forfeiture of vehicles used to remove taxed articles to defraud the revenue.

There is no direct conflict between the forfeiture provisions in Section 3450 and those in Section 26 of the National Prohibition Act. The test of direct conflict is whether proof of facts justifying forfeiture under Section 26 would in all cases establish ground for the more severe forfeiture authorized by Section 3450. Different offenses are involved and

different proof is required. Proof of one offense authorizes forfeiture of guilty interests under Section 26. If to this is added proof of other facts, establishing the additional offense of tax evasion, the more severe forfeiture under Section 3450 results. Each is operative within its field, and they are not in direct conflict.

II. Conviction of the man in charge of the vehicle for unlawful transportation under the National Prohibition Act does not confine the United States to forfeiture of guilty interests and is not a bar to forfeiture under Section 3450, if tax evasion is added to illegal transportation. If conviction of the individual under one statute bars proceedings *in rem* for forfeiture under the other, it must be because the statutes directly conflict or because it is so provided by their terms. The provision in the Supplemental Act that a conviction under one statute shall be a bar to prosecution for the same act under the other statute relates only to convictions and prosecutions of the individual and not to proceedings *in rem*. A conviction of the individual for the crime of tax evasion under Section 3450 bars prosecution of the individual for illegal transportation under the National Prohibition Act, and therefore would prevent summary forfeiture proceedings under Section 26 of the latter Act, because conviction of the individual is a condition precedent to summary forfeiture under Section 26, but the converse is not true, because, while conviction under the National Prohibition Act bars prosecution of

the individual under Section 3450, conviction of the individual under Section 3450 is not a condition precedent to forfeiture of the vehicle thereunder.

The provision of Section 26 that after the conviction of a person arrested for illegal transportation the court *shall* proceed to summary forfeiture thereunder does not prevent calling into operation the forfeiture provisions of Section 3450 if the facts justify it. The two may be joined and the severer or milder forfeiture may result, depending upon the facts. The purpose of the provision in the Supplemental Act against double convictions was intended to prevent two punishments of the individual for the same act. There is no double punishment of the individual, nor double punishment of the vehicle, if the forfeiture under Section 3450 occurs. Under Section 26 part of the value of the vehicle is forfeited and under Section 3450 the remainder of its value may be forfeited. The same value is not twice lost to anybody.

ARGUMENT

I

THERE ARE TAXES IMPOSED BY LAW ON LIQUOR ILLICITLY DISTILLED, WHICH ARE TAXES WITHIN THE MEANING OF SECTION 3450, REVISED STATUTES, AND THERE IS NO DIRECT CONFLICT BETWEEN THAT SECTION AND SECTION 26 OF THE NATIONAL PROHIBITION ACT

Section 35 of the National Prohibition Act provided that Acts inconsistent were repealed only to the extent of the inconsistencies, and in other re-

spects the National Prohibition Act should be construed as in addition to existing laws, and it provides:

> This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers.

After its passage much conflict arose in the lower Federal courts as to whether any tax was imposed on liquor illegally distilled, and whether the provisions of law providing penalties or forfeitures for nonpayment of taxes remained in effect as to liquor distilled in violation of the National Prohibition Act.

In *United States* v. *Yuginovich*, 256 U. S. 450, decided June 1, 1921, this Court considered an indictment obtained after the passage of the National Prohibition Act, in which the defendants were charged with unlawfully engaging in the business of distillers and in distilling spirits and with defrauding the United States out of the tax on spirits and with failing to keep its distillery marked and operating it without giving bond, in violation of

various sections of the Revised Statutes, and the Court said (p. 464) that although, by Section 35 of the National Prohibition Act, Congress "manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act." Thereupon Congress enacted Section 5 of the Supplemental Act of November 23, 1921 (C. 134, 42 Stat. 222, 223), which provided:

> That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. * * *

The Committee on the Judiciary of the House, in its Report on the Bill, said:

> Section 5 has been added to this bill as an amendment to meet a situation created by a decision of the Supreme Court, dated June 1, 1921, in which that court in effect

> held that the revenue laws applicable to the manufacture, taxation, and traffic in intoxicating liquor for beverage purposes are no longer in force. In the years past it has been deemed necessary to maintain the strictest kind of control over all kinds of liquor to prevent it from being made and sold without the payment of taxes, and there is if anything a greater necessity for such control at this time. *There is no practical way of distinguishing between beverage and nonbeverage liquor, and there certainly can be no good reason why the man who makes liquor in violation of law should be dealt with more leniently than the man who makes it for lawful purposes.* During the last year the Government collected more than $138,000,000 in revenue from liquor, and there is every reason to believe that the present rate of taxation will be maintained if it is not increased in the next revenue law. (Italics ours.) [Report No. 224, House of Representatives, 67th Cong., 1st Sess.]

Following that came the decision of this Court in *United States* v. *Stafoff*, 260 U. S. 477, arising after the passage of the Supplemental Act of November 23, 1921, and decided January 2, 1923. There Stafoff was indicted for having in possession a still intended for the production of distilled spirits without having registered it with the Collector of Internal Revenue and with having unlawfully manufactured spirits other than in an authorized distillery, contrary to the provisions of the

statutes. The Court, referring to the House Report, above cited, and to the Supplemental Act of November 23, 1921, recognized that Congress by the Supplemental Act intended not only to keep in effect taxes on liquor illegally distilled, as well as on that legally distilled, but to keep in effect the provisions of the Revised Statutes imposing penalties for failure to pay the taxes or for defrauding the United States of the revenue. It can not be doubted that Congress intended to impose what it called and considered taxes on whiskey illegally distilled and to renew as operative and applicable to illegally distilled liquors all of the laws "in regard to the manufacture and taxation" of liquor as well as "all penalties for violations of such laws." The only qualification in the Supplemental Act relating to such provisions of the statutes in force at the time of the National Prohibition Act is as to those which "are directly in conflict" with any provisions of the National Prohibition Act, and the question here is whether there is any direct conflict between the National Prohibition Act and Section 3450 or any other provisions of law on which forfeiture by Section 3450 depends. The section of the Revenue Act of 1918, amended in 1921, imposing taxes on "spirits that have been or that may be hereafter produced," was a law in regard to the taxation of intoxicating liquor, kept in effect by the Supplemental Act. It applied by its terms to liquor illegally produced as well as to that legally produced, and the Report of the Judiciary Com-

mittee does not permit of doubt that Congress intended to impose those taxes on spirits illegally produced. The tax is on the product, not on the act of producing it.

Section 3450 of the Revised Statutes, providing for forfeiture of vehicles used in removing or concealing merchandise with the intent to defraud the United States of the taxes thereon, is a law imposing penalties for violation of the laws relating to taxation of liquor within the meaning of the Supplemental Act. True, Section 3450 does not relate exclusively to taxes on intoxicating liquor, but the Supplemental Act does not provide that only the laws relating exclusively to liquor are retained in operation.

There is no direct conflict between the provisions of the Revenue Laws imposing taxes on all distilled spirits and the provisions of the National Prohibition Act. Such direct conflict as did exist was removed by Section 35 of the National Prohibition Act, which provided that no stamps should be sold in advance for the taxes on distilled liquor. That taxes were to be levied on spirits illegally distilled was expressly recognized by Section 35 of the National Prohibition Act.

The Revenue Act of 1918 imposed a tax of $2.20 per gallon on all spirits "now in bond or that have been or that may be hereafter produced" in the United States. It made no distinction between legal and illegal distillation. Spirits, fit, though not intended for beverage use, have been distilled

lawfully under the provisions of the Prohibition Act.

Section 3248 of the Revised Statutes provides that "the tax shall attach to this substance as soon as it is in existence as such."

Section 3251 of the Revised Statutes places a lien on the liquor for the amount of the tax. (Judge Denison overlooked this in 5 F. (2d) 1.)

The Revenue Act of 1918 provided for an increase in this tax from $2.20 to $6.40 per gallon if withdrawn for beverage purposes.

Section 35 of the National Prohibition Act, thereafter enacted, expressly provided that the Act should not relieve anyone from paying any taxes imposed by law upon the manufacture or traffic in liquor, and, having reference to the Revenue Act of 1918, provided that the person responsible for illegal manufacture should pay a tax "in double the amount now provided for by law," with an additional penalty of $500 on retail dealers and $1,000 on manufacturers.

The National Prohibition Act left in effect, therefore, the basic tax of $2.20 per gallon, which was a true tax on the product legally or illegally distilled, and added to it what Congress called a tax—but which amounts to a penalty for infraction of the law—an additional amount equal to the original tax plus some specific penalties, which were called such.

The Revenue Act of 1921 kept in force the abovementioned tax provisions of the Act of 1918 and

added to it a proviso that if the basic tax of $2.20 per gallon had been paid and the spirits were thereafter diverted to beverage purposes there should be an additional tax of $4.20. The proviso was intended to deal with cases where the beverage rate of $6.40 had not been collected in the first instance.

We have in effect a law imposing a tax of $2.20 per gallon on all spirits distilled, whether legally or illegally distilled, laws making distillation illegal in some cases and legal in others, and other laws which provide for doubling that tax in case of illegal distillation or diversion, which are called taxes by Congress and were understood by it to be such, although intrinsically penalties. That the basic tax of $2.20 per gallon is a tax and not a penalty is clear. When we deal with so-called taxes on articles which may not lawfully be produced under any conditions, or increased taxes on account of illegality, we are in another field. We do not question that the penalties of $500 and $1,000 imposed by Section 35 are penalties for infraction of law, nor that the doubling of the tax, because of infraction of law, may be considered a penalty; but a tax on a certain article which may be legally or illegally produced, and which applies to all the articles of the class regardless of their origin is not a penalty as to those articles which are manufactured without compliance with law. Such a tax on articles illegally produced is not imposed because of illegality but despite it.

The discussion of the decisions of this Court relating to what are penalties and what are taxes in the opposing briefs goes beyond the necessities of this case.

In *Trusler* v. *Crooks,* 269 U. S. 475, it appeared that under the guise of a tax Congress was attempting to regulate transactions reserved to the police power of the States, because the amount of the alleged tax was two hundred times the amount of the consideration of the taxed transaction and resulted in absolute prohibition. The importance of determining there whether there was a true tax or penalty was because of the necessity of giving effect to the division of power between the State and Federal governments. Similar necessity for determining whether a tax or a penalty was imposed has arisen in other cases.

In *Regal Drug Company* v. *Wardell,* 260 U. S. 386, it was necessary to determine whether the imposts were intrinsically penalties or taxes, because, if penalties, the method of collection violated the due process clause of the Constitution. Here no such considerations are involved. Congress has power to regulate the liquor traffic, and a regulation under the guise of the tax is not objectionable for that reason, and there is no question of due process of law, or administrative enforcement of penalties, here presented. The only reason for inquiring whether there are taxes or only penalties imposed upon liquor illicitly distilled is to ascer-

tain whether there is a tax within the meaning of Section 3450 authorizing forfeiture of the vehicle used in moving the commodity to avoid the tax. It is a question of the intent of Congress, and it is unimportant whether the imposts are true taxes or inherently penalties if Congress has intended to have them treated as taxes within the meaning of that word as it is used in Section 3450. There is no question of due process of law as against the innocent owner of the automobile. *Goldsmith-Grant Company* v. *United States,* 254 U. S. 505.

In the case of use of a vehicle for evasion of taxes, the forfeiture of innocent interests under Section 3450 has always involved a forfeiture of property of an innocent person, and that condition is not aggravated if the liability, the evasion of which results in the forfeiture of the vehicle, is itself imposed in the nature of a penalty.

The basic tax of $2.20 per gallon is a true tax on liquor legally or illegally distilled, and is a tax within the meaning of Section 3450. The additional imposition of $4.20 per gallon on spirits withdrawn for beverage purposes imposed by the Revenue Act and the doubling of the tax by Section 35 of the National Prohibition Act, while they may inherently be penalties for infraction of law, are labeled taxes by Congress, treated as taxes by it, and the legislative intent is clearly disclosed that they shall be considered taxes within the meaning of the word "tax" as used in Section 3450 and other statutes. They are liabilities of the distiller

and liens upon the liquor itself. It is sufficient, without going that far, to bring into operation Section 3450 that a basic tax of $2.20 is imposed, which is inherently a tax and not a penalty.

Whether we treat half of the doubled tax as imposed by the Revenue Act and the other half as a penalty added by Section 35 of the National Prohibition Act, on account of illegal distillation, or whether we treat the entire impost as one laid by Section 35 as a substitute for the tax levied by Section 600 of the Revenue Act, is immaterial. In either case, *to the extent the impost does not exceed that on lawfully distilled liquor,* it is not imposed because of infraction of law, and is a true tax, not a penalty. Neither in *Lipke* v. *Lederer,* 259 U. S. 557, nor in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, did the Court have occasion to do more than hold certain imposts to be penalties, which were imposed only on illegal transactions and because of the infraction of law.

The remaining question is whether there is a direct conflict between Section 26 of the Prohibition Act, relating to forfeiture of vehicles for illegal transportation, and Section 3450 of the Revised Statutes, which provides for forfeiture of vehicles used to remove articles with intent to defraud the revenue. There is no direct conflict, because different offenses are involved, and different evidence must be produced to effect a forfeiture under Section 3450, from that sufficient under Section 26.

The test of direct conflict is whether the facts establishing a violation of the National Prohibition Act, leading to forfeiture under Section 26 of that Act, necessarily make out a violation of Section 3450. If so, there would be a direct conflict, because in that case the limited forfeiture of guilty interests provided for in Section 26 would never be operative, since proof of the offense necessary to forfeit under Section 26 would automatically produce the unlimited forfeiture under Section 3450. But that is not the case. It is too evident for discussion that proof leading to forfeiture under Section 26 of the National Prohibition Act may, and in many cases would, fall short of establishing ground for forfeiture under Section 3450.

At the time of the passage of the National Prohibition Act large quantities of distilled spirits lawfully distilled were in bonded warehouses, to which the tax had attached, but which had not been paid. The time limit on payment of such taxes was entirely removed by the Revenue Act of 1918, and large quantities of lawfully distilled spirits to which taxes have attached and are unpaid are still in the United States, some of which may be transported in violation of the National Prohibition Act. In addition to that, intoxicating spirits fit, though not intended, for beverage purposes have been lawfully distilled under permit and supervision of the Treasury Department since the enactment of the National Prohibition Act and are subject to true taxes. It has never been suggested

that an automobile used to remove or conceal such legally distilled liquors, for the purpose of defrauding the revenue, could not be forfeited under Section 3450 merely because they are being transported in violation of the Prohibition Act. To hold, in the case of removal or transportation of spirits illegally distilled, that the vehicle used may only be forfeited under Section 26 of the National Prohibition Act, while in the case of legally distilled liquor Section 3450 may be resorted to, is to hold that where the crime of tax evasion is preceded by the offense of illicit distillation, a less severe forfeiture is inflicted than if tax evasion alone were involved. This consequence, which would flow from a conclusion adverse to the Government in these cases, would be in direct conflict with the intention of Congress as disclosed in the statutes and the Congressional Record.

II

CONVICTION OF ILLEGAL TRANSPORTATION UNDER THE NATIONAL PROHIBITION ACT OF THE INDIVIDUAL USING A VEHICLE TO TRANSPORT DOES NOT BAR PROCEEDINGS IN REM UNDER SECTION 3450 FOR FORFEITURE OF INNOCENT AS WELL AS GUILTY INTERESTS IN THE VEHICLE

The doctrines relating to election of remedies in civil suits have no application here. They relate only to choice of remedies to enforce a single right or correct a single wrong. Here there were two distinct offenses committed and to be punished.

If conviction of the individual for one offense bars proceedings *in rem* for forfeiture of the article under the other statute, it must be because the statutes directly conflict or because it is so provided by their terms. That there is no direct conflict between Section 3450 of the Revised Statutes and Section 26 of the National Prohibition Act has been discussed above. The two provisions of law referred to as supporting the claim that prosecution under one statute bars forfeiture of the car under the other are the provision in Section 5 of the Supplemental Act of November 23, 1921, that "if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other," and the provision in Section 26 of the National Prohibition Act, which provides that, after the individual using a vehicle is convicted of illegal transportation, "the court upon conviction of the person so arrested" *shall* order a sale of the car and a distribution of the proceeds, protecting the rights of innocent interests and lien holders.

The provision in Section 5 of the Supplemental Act relates to convictions of individuals and prosecutions of individuals, and the language of the provision does not justify the view that a conviction of the individual under one Act should bar a proceeding *in rem* for forfeiture under the other. Conviction of the individual for tax evasion under Section 3450 is a bar to prosecution of the individual

for illegal transportation under the National Prohibition Act, and as conviction of the individual under the National Prohibition Act is by the terms of Section 26 of that Act a condition precedent to summary forfeiture under Section 26 it follows that a conviction of the individual under Section 3450 does prevent the summary forfeiture provided for by Section 26; but this is of no consequence, because if the Government has at hand the evidence to convict the individual under Section 3450, it is readily able to proceed to forfeit the car, including the interests of innocent persons therein, under Section 3450.

The contrary is not true. A conviction of the individual for illegal transportation under the National Prohibition Act may bar a prosecution of the individual for tax evasion under Section 3450, but as conviction of the individual under Section 3450 is not a condition precedent to forfeiture of the vehicle under Section 3450, conviction of the individual under the National Prohibition Act does not bar proceedings *in rem* under Section 3450.

It is suggested that if a prosecution of the individual, followed by conviction, occurs under the National Prohibition Act the court must go on and conduct the summary forfeiture proceedings under Section 26, as the language of that section is mandatory and there is no way to stop the proceedings under Section 26 after the conviction occurs; and the argument is made, if this be so, that proceedings under Section 26 must be had and

that Section 3450 may not be invoked. The defect in this reasoning is in assuming that because proceedings are being conducted under Section 26, the Government can not interpose under Section 3450 additional reasons for forfeiting not only the guilty interests but the innocent interests in the automobile. If one offense results in forfeiture of the guilty interests and another offense results in the forfeiture of the innocent interests in the vehicle, there is nothing to prevent joinder of the two claims in one proceeding; and if the Government stops short with proof justifying only forfeiture of the guilty interests, that relief may be granted, and if additional proof is offered showing an additional offense requiring forfeiture of the innocent interests the decree may be entered accordingly.

When we consider that proceedings *in rem* under Section 3450 may be had, and a car forfeited without any prior prosecution or conviction of the individual, and that a subsequent conviction under the Prohibition Act of the individual could not be then followed by forfeiture under Section 26, because no car would be there to forfeit, the correctness of these contentions is confirmed.

If forfeiture proceedings under Section 26 are under way, or even if the car has been sold and the proceeds are awaiting distribution, the Government may intervene by libel *in rem* against the car or its proceeds, under Section 3450 and ask that the entire value of the car be forfeited. Such a

joinder of the two claims is disclosed in *United States* v. *385 Barrels of Wine,* 300 Fed. 565 (United States District Court for the Southern District of New York, June 5, 1924).

In dealing with the claim that offenses charged in two articles were one and the same offense, the Court said in *Carter* v. *McClaughry,* 183 U. S. 365, 394:

> The offenses charged under this article were not one and the same offense. This is apparent if the test of the identity of offenses that the same evidence is required to sustain them be applied. The first charge alleged "a conspiracy to defraud," and the second charge alleged "causing false and fraudulent claims to be made," which were separate and distinct offenses, one requiring certain evidence which the other did not. The fact that both charges related to and grew out of one transaction made no difference.

The Court quoted with approval the following from *Morey* v. *Commonwealth,* 108 Mass. 433:

> A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof

> of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

While the court was there dealing with double jeopardy, which is not here involved, its statements are instructive in determining whether there is any conflict between Section 26 and Section 3450. The quotations from that opinion afford an explanation of the provision in Section 5 of the Supplemental Act that conviction under one statute shall bar a prosecution for the same act under the other statute. Double jeopardy under the Constitution would not exist in this case, because there are two distinct offenses, and that is why Congress put this provision in Section 5. Its purpose was to prevent double punishment of the individual and two fines or two sentences of imprisonment inflicted upon one individual for a single act which might constitute an offense under two statutes. As to Section 3450 and Section 26, we can consider them as both operative within their respective fields; they do not in any case produce a double punishment upon an individual. Neither do they produce double loss of property. The interest of the guilty person in the automobile is forfeited in either case, and the remaining interests of innocent persons in the automobile not forfeited for violation of the National Prohibition Act may be forfeited in a proper case under Section 3450. There is no double pun-

ishment for the same act and no double fine or loss on any interest.

CONCLUSION

If the views herein expressed are sound, the judgment in *United States* v. *One Ford Coupe* should be reversed, and all the questions in the *Port Gardner case* should be answered in the affirmative except the Fifth, which should be answered in the negative.

As to question Three, it may be said that Section 3251, R. S., imposes a lien on the liquor for the tax, and its concealment or removal by anyone with notice that the tax is unpaid, defrauds the revenue. Section 3450 has never been limited to the initial movement from a lawful place of storage or from the place of manufacture. *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505; *Commercial Credit Co.* v. *United States,* 5 F. (2d) 1.

The other view would mean that no one who participates in the concealment or movement to defraud the United States would be guilty under Section 3450 unless a party to the first movement, and no vehicle used may be forfeited unless the "initial carrier."

The lower Federal courts have shown a reluctance to adopt these views. This attitude seems to have resulted from a repugnance to treating as a tax, a liability which can not be paid without disclosure of a violation of law, and to a feeling that the law primarily in mind in the transporta-

tion of illicit liquor is the Prohibition Act and not the revenue laws.

It is enough to say that Congress must have had these considerations in mind, has deliberately laid them aside, and plainly directed that the tax laws and their penal provisions may be resorted to as a means to aid in the enforcement of prohibition.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

MAHLON D. KIEFER,
Chief Attorney.

OCTOBER, 1926.

APPENDIX

Section 26, Title II, of the National Prohibition Act (c. 85, 41 Stat. 305, 315):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the

sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be no newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

Section 35 (p. 317):

All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This

Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

Act of November 23, 1921 (Supplemental Act), c. 134, 42 Stat. 222, 223, Sec. 5:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a

conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

Section 3450 of the Revised Statutes:

Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of

this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

Section 600(a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1105:

> That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law.

Section 600 of Title VI of the Revenue Act of 1921, c. 136, 42 Stat. 227, 285:

That subdivision (a) of section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following: "*Provided*, That on all distilled spirits on which tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion."

○

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

THE UNITED STATES,
Petitioner,
vs.
ONE FORD COUPE AUTOMOBILE, No. 4776501, ALABAMA LICENSE No. 10978, GARTH MOTOR COMPANY,
Claimant.

No._____

RESPONDENT'S BRIEF

WILLIAM S. PRITCHARD, Birmingham, Ala.,
Attorney for Respondent

Birmingham Publishing Co.—50—5-26-25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

THE UNITED STATES,
Petitioner,

vs.

ONE FORD COUPE AUTOMOBILE, No. 4776501, ALABAMA LICENSE No. 10978, GARTH MOTOR COMPANY,
Claimant.

No.----------

RESPONDENT'S BRIEF

THE PETITION OF THE UNITED STATES FOR WRIT OF CERTIORARI SHOULD BE DENIED

FACTS

The facts relied on by the Government are that one Killian had the automobile in question in his possession and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled, with the intent to defraud the United States of its internal revenue tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title un-

til the purchase price should be paid, of which, at the time the libel was filed, there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed, the sale was innocently made to another person. The District Court dismissed the libel.

LAW

Proposition One

Section 3450, Revised Statutes, is superceded by Section 26 of the National Prohibition Act, insofar as there is a conflict between the two.

National Prohibition Act (41 Statute 305).
United States vs. One Haynes Automobile (5 CCA, July 25, 1921), 274 Fed. Rep. 926.
One Big Six Studebaker Automobile vs. United States (9 CCA, May 28, 1923), 289 Fed. 256.
Holding of Circuit Court of Appeals for the 5th Circuit in instant case.

Proposition Two

The interest of an innocent third party in an automobile used in the illegal transportation or storage of prohibited liquor is not subject to forfeiture.

Jackson vs. United States (9 CCA Jan. 7, 1924) 295 Fed. Rep. 621.
Oakland Motor Co. vs. United States (9 CCA, Jan. 7, 1924), 295 Fed. Rep. 626.

Proposition Three

Since the enactment of the National Prohibition Act a suit cannot be maintained under Revised Statutes 3450

for forfeiture of a vehicle as having been used to remove and conceal distilled spirits, whereon a double tax (penalty) has been imposed upon the said Prohibition Act, with intent to defraud the United States of such tax.

Eighteenth Amendment to the Constitution of the United States.
Lipke vs. Lederer, 259 United States 557.
Regal Drug Corp. v. Wardell, Collector of Internal Revenue, 260 United States 386.
Yuginovich vs. United States, 256 United States 450.
United States vs. Stafoff, et als, 260 United States 477.
United States v. One Haynes Automobile (5th CCA. 7-25-21), 274 Fed. Rep. 926.
Fontenot, Collector of Internal Revenue, v. Accardo (5th CCA, 2-15-1922), 278 Fed. Rep. 871.
Lewis v. United States (6th CCA, 4-14-1922), 280 Fed. Rep. 5.
McDowell vs. United States (9th CCA, 2-5-1923), 286 Fed. Rep. 521.
One Ford Touring Car v. United States (8th CCA, 10-21-1922), 284 Fed. Rep. 826.
One Big Six Studebaker Automobile vs. U. S. (9th CCA, May 28, 1923), 289 Fed. 256.

PROPOSITION FOUR

Revised Statutes 3450, as to forfeiture of automobiles, was repealed by the National Prohibition Act.

National Prohibition Act (41 Statutes 305).
One Big Six Studebaker Automobile v. United States (9th CCA, May 28, 1923), 289 Fed. Rep. 256.
And Authorities Supra.

PROPOSITION FIVE

The matter involved herein is not a revenue law, invoked as such, but on the contrary is an effort on the part of the Government to confiscate certain personal property by way of punishment. Such statutes are always construed with the greatest strictness against the one seeking the forfeiture.

United States v. Loomis (9th CCA, March 28, 1924), 297 Fed. Rep. 359.

PROPOSITION SIX

There was no tax on illicit distilled spirits during August, 1923; wherefore, the automobile in question could not have been used for the purpose of depositing and concealing therein illicit distilled spirits with intent then and there to defraud the United States of taxes.

Authorities cited under Proposition Three.

PROPOSITION SEVEN

Sufficient facts are not alleged in the libel to warrant the relief therein prayed for; therefore, the motion to quash was correctly sustained.

See: Libel as set out in Transcript.

ARGUMENT

This cause was originally tried before the Honorable William I. Grubb, United States Judge for the Northern District of Alabama. The United States, feeling aggrieved at his decision in the premises, prosecuted an appeal to the United States Circuit Court of Appeals for

the Fifth Circuit. There, in an opinion in which all of the judges of that court concurred, Judge Grubb's decree was affirmed. It is well to here note that each of the courts in question had the benefit of substantially the same brief as is now filed by the petitioner in this court.

It cannot be denied that Section 3450 of Revised Statutes provides for the forfeiture of any vehicle used to remove or conceal any goods or commodities whereon a tax has been imposed, when such removal or concealment is with intent to defraud the United Staates of such tax or any part thereof. It was designed to aid in the collection of revenue, when the raising of a large revenue from the authorized manufacture and sale of intoxicants was a part of the financial policy of the Government.

Now, that is at the time the instant automobile was seized, and the libel in question sworn out, there could be no lawful manufacture, sale, or transportation of such liquor for beverage purposes. Nor liquor revenue stamps, or tax receipts could be purchased or used in advance of seizure. However, upon evidence of such illegal manufacture or sale a tax shall be assessed against the person responsible for such illegal manufacture or sale *in double the amount* as was then provided by law, with an additional penalty of $500.00 on retail dealers, and $1,000 on manufacturers.

In short, Section 26 of the Volstead Act provides that, whenever intoxicating liquors, transported or possessed illegally, are seized by an officer, he shall take possession of the vehicle, etc., and arrest the person in charge and proceed as provided in Section 26 against said person and vehicle. Section 35 repeals all prior provisions of law to the extent of their inconsistency, and no more. This court decided in the case of United States v. Yuginovich, 255 United States, 450, that this provision of the

To be argued by
DUANE R. DILLS,
Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 115

THE UNITED STATES OF AMERICA, *Petitioner,*

v.

ONE FORD COUPE AUTOMOBILE, NO. 4776501, ALABAMA LICENSE NO. 10978, GARTH MOTOR COMPANY, *Claimant.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. [redacted] 173

PORT GARDNER INVESTMENT COMPANY,

v.

THE UNITED STATES OF AMERICA.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief on Behalf of
Garth Motor Company, Claimant, in Case No. 473;
Port Gardner Investment Company, in Case No. 611.

DUANE R. DILLS,
Counsel.

WILLIAM S. PRITCHARD,
Birmingham, Ala.,
JOHN W. CREEKMUR,
Chicago, Ill.,
PHILLIP W. HABERMAN,
FRANK H. TOWSLEY,
New York City,
Of Counsel in Case No. 473.

LOREN GRINSTEAD,
WILLIAM T. LAUBE,
JAMES A. LAUGHLIN,
Seattle, Wash.,

THOMAS E. DAVIS,
Portland, Ore.,
Of Counsel in Case No. 611.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

INDEX.

AUTHORITIES.

3. CASES CITED:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 473.

THE UNITED STATES OF AMERICA, Petitioner,

v.

ONE FORD COUPE AUTOMOBILE, No. 4776501, ALABAMA LICENSE No. 10978, GARTH MOTOR COMPANY, Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 611.

PORT GARDNER INVESTMENT COMPANY,

v.

THE UNITED STATES OF AMERICA.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF

Garth Motor Company, Claimant, in Case No. 473;

Port Gardner Investment Company, in Case No. 611.

STATEMENT.

Case No. 473.

Garth Motor Company, Claimant.

This case comes before the United States Supreme Court upon writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit under Section 240

of the Judicial Code granted on June 1, 1925 by this court, on application by the Government.

On September 18, 1923, the Government filed a libel in the United States District Court for the Northern District of Alabama against one Ford Coupe Automobile, Motor No. 4776501, Alabama License No. 10978, for forfeiture under Section 3450 Revised Statutes, and attached to and made a part of the libel petition was a complaint charging one Ed. L. Killian, the user of the automobile, residing at 4110 Fifth Avenue, South Birmingham, Alabama, with possession on or about August 11, 1923, of 27 quarts of rye whiskey in said automobile **in violation of the National Prohibition Act (R. 4-5).**

The facts as stated in the opinion of the United States Circuit Court for the Fifth Circuit (reported in 4 Fed. (2nd) 528), are as follows:

> "The facts relied on by the Government are that one Killian had the automobile in his possession, and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled with the intent to defraud the United States of its Internal Revenue Tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title until the purchase price should be paid, of which at the time the libel was filed there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed the sale was innocently made to another person. The District Court dismissed the libel."

An appeal was taken by the Government to the United States Circuit Court of Appeals for the Fifth Circuit, and the order of the District Court in dismissing the libel was

affirmed February 27, 1925 (R. 14-17). Upon application by the Government a writ of certiorari was granted, bringing the case to this court.

Case No. 611.

Port Gardner Investment Company v. The United States of America.

This case comes before the Supreme Court upon certificate of the United States Circuit Court of Appeals for the Ninth Circuit, certifying certain questions of propositions of law under Section 239 of the Judicial Code. The statement of facts and the propositions of law set forth in the certificate are as follows:

STATEMENT OF FACTS.

This action came to the Circuit Court of Appeals for the Ninth Circuit upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division, upon a decree in favor of the United States ordering a certain Jewett Sedan automobile forfeited.

On August 9, 1924, prohibition agents seized one Jewett Sedan automobile in Snohomish County, Washington, and within the jurisdiction of the District Court of the United States for the Western District of Washington, Northern Division. The automobile was being driven by one Luther L. Neadeau, who had purchased same under a conditional sales contract retaining title in the vendor. In the automobile was found a five gallon keg of illicit liquor, commonly known as "moonshine whiskey", on which no tax had been paid.

Neadeau was charged with possession and transportation of intoxicating liquors in violation of the National Prohibition Act, pleaded guilty to both charges and was sentenced to pay a fine (fol. 2). The Government sought to forfeit the automobile under Section 3450 of the United States Revised Statutes on the ground that the same was being used by said Neadeau in the removal and for the deposit and concealment of large quantities of distilled spirits, to wit, moonshine whiskey, with the intent to defraud the United States of the tax thereon. The plaintiff-in-error, assignee of the vendor and owner of the conditional sales contract and of all rights of the vendor in and to the automobile, intervened in the action, filed an answer and a claim to the automobile, and asked protection of its interest therein.

At the trial a stipulation was filed in which it was agreed that the plaintiff-in-error holds title to the automobile under a valid conditional sales contract, and that there remains unpaid a balance of seven hundred ninety-four and 08/100 Dollars ($794.08), and that neither plaintiff-in-error nor its assignor, the vendor of the car, had knowledge or notice prior to the time the car was seized that it was being used or was intended to be used in any illegal manner.

The driver of the car was not a manufacturer of the liquor and was not shown to be connected in any way with the manufacture of the same, but had purchased it along the public highway and had just arrived at his home with the same when he was arrested and the car seized.

In the State of Washington there is in effect what is commonly known as the "bone-dry law," making it unlawful for any person to have in his

possession intoxicating liquors, and the Government Agents testify that a permit will not be granted to anyone to manufacture or have in his possession such liquor in a "bone-dry" state such as the State of Washington, and that there is no place in the State of Washington where intoxicating liquor can be legally kept without the tax thereon being paid, and that there is no distillery warehouse, bonded warehouse or other place in the State of Wash-
(fol. 3) ington where intoxicating liquor can be legally kept either without the tax thereon having been paid or otherwise.

Questions Certified.

The questions of law concerning which the United States Circuit Court of Appeals for the Ninth Circuit desires instructions and advice of the United States Supreme Court are as follows:

1. Is Section 3450 of the Revised Statutes of the United States in force and effect in so far as it provides for the forfeiture of automobiles or other vehicles where the same are used or are being used for the transportation of intoxicating liquor?

2. Do the provisions of Section 3450 of the Revised Statutes of the United States authorize the forfeiture of the interest of a conditional vendor reserving title to a conveyance who is free from knowledge, blame or negligence in the premises where the goods or commodities concerned consist of intoxicating liquors illicitly manufactured or imported, a case under the Section referred to being made out in other respects.

3. Does Section 3450 of the Revised Statutes authorize the forfeiture of taxable goods or commodities and the carriage or other conveyance used

in the removal or for the deposit or concealment thereof where the only removal, deposit or concealment with intent to defraud the United States of such tax that can be shown is the mere movement of such goods on a trip other than from the original point of importation, manufacturing or bonded warehousing.

4. In the State of Washington, where there is no place where intoxicating liquor can be legally kept without the tax thereon being paid or otherwise, can an automobile be said to have been guilty of being used for the removal, deposit or concealment of intoxicating liquor with intent to defraud the Government of the tax imposed thereon where it is merely shown that the liquor is found in the automobile and that no tax thereon has been paid.

(fol. 4) 5. Did the prosecution of the driver of the car under the National Prohibition Act constitute an election by the Government to proceed under Section 26 of that Act and thereby prevent the forfeiture of the car under Section 3450 of the Revised Statutes of the United States?

6. Is there any tax on intoxicating liquor illicitly manufactured as the word tax is meant and used in Section 3450 of the Revised Statutes of the United States or are the so-called taxes now claimed to be collectible merely penalties?

Preliminary Statement.

The cases now before this court are of great importance to the automobile industry, which according to the Bureau of the Census, Department of Commerce, is now the largest industry in the United States, and generally believed to be

the largest industry in the world. The development of this industry through the marketing of its product has been through commercial banking operations, now of great magnitude, carried on by finance and credit companies who finance the retail dealers in their sales to the ultimate purchasers, and in such financing conditional sale contracts, chattel mortgages and other security instruments are used. The use of these instruments in the automobile business did not originate with bootleggers in order to avoid liability under the National Prohibition Act, as the Government intimates in its brief in Case No. 473 (Garth Motor Company, Claimant), but rather they have made possible the remarkable development of the automobile industry. See article in October, 1925, The World's Work Magazine, page 575, and article on "Finance Companies", in January, 1923, Federal Reserve Bulletin and which bulletin says, "such finance companies are an intensified part of our commercial banking system". During the year 1924 there were manufactured and sold in the United States alone 3,243,285 automobiles, and during the year 1925 to November of this year there have been manufactured and sold in the United States over 4,000,000 automobiles, and it is assumed that at least 75% of these automobiles are sold upon time payment plans, in which the dealers reserve title or lien by use of conditional sales, chattel mortgages and other instruments. There are over 1,000 active finance and credit companies financing conditional sale contracts and other security instruments arising out of the sale of automobiles in this country, and employing in the same capital and borrowings in excess of two billion dollars ($2,000,000,000). These borrowings are from banks throughout the country and very largely upon the rediscount or trusteeing of such se-

curity instruments. In the National Association of Finance Companies there are 250 of such institutions, with combined capital and surplus employed in the financing of automobiles to an excess of $150,000,000. It is impossible for the automobile dealers and the finance and credit companies and the banks with which such security instruments are rediscounted to know at the time of the sale of an automobile that the automobile will not be used in violation of the National Prohibition Act. At the time of the enactment of Section 3450, such security instruments were scarcely known, and certainly were not the important and extensive medium of commerce that they are now. All of this Congress, it is safe to assume, had in mind when it enacted the salutary provisions of Section 26 of the National Prohibition Act, and intended its application to the forfeiture of automobiles in aid of prohibition. See United States *v.* One Buick Sedan (Cal.), 1 Fed. (2) 997, at 999.

While the Government, with its refinements and distinctions without a difference (See Lewis *v.* United States (C. C. A. 6), 280 Fed. 5) attempts to differentiate Section 3450 Revised Statutes from Section 26 of the National Prohibition Act, nevertheless it frankly admits in its brief, in Case No. 473 (Garth Motor Company, Claimant) that it seeks to use Section 3450 Revised Statutes as an aid and enforcement of the National Prohibition Act, and does not avail itself of Section 26 because of certain inconveniences and annoyances caused to it under that section. The difficulties now before this court are caused by the attempt of the Government to wrest Section 3450 out of its plain context, to accomplish what it now believes to be a good purpose, the enforcement of the National Prohibition Act. The reasonings and the arguments advanced by the Government, to say

the least, are not convincing, and deserve the remarks of the court in United States *v.* American Brewing Company (Pa. —2 Judges), 296 Fed. 772:

> "Resort to the expedient of having the enforcement officer who serves the warrant given an eleventh hour admission into the ranks of the Revenue Agents or adding to the affidavit which would support the warrant * * * another affidavit in the verbiage of the revenue statutes smacks too much of the proverbial grasping at straws and is too suggestive of the frantic scrambles of one who is lost in darkness and knows no way into the light."

Summary of Argument.

1. Section 3450 Revised Statutes, as applied to the facts in both instant cases, was repealed by the adoption of the National Prohibition Act, 41 Stat. 305 (United States *v.* Yuginovich, 256 U. S. 450, Lewis *v.* United States (C. C. A. 6), 280 Fed. 5) and was not re-enacted by Section 5 of the Supplemental Act of November 23, 1921, 42 Stat. 222, (sometimes referred to as the Willis Campbell Act), because Section 3450 is in direct conflict with the National Prohibition Act, and especially Section 26 thereof, as applied to the facts in the cases at bar. United States *v.* Stafoff, 260 U. S. 477, does not hold the contrary, because the questions now presented were not present in that case. (Commercial Credit Company *v.* United States (C. C. A. 6) 5 Fed. (2d) 1.)

There is a direct conflict because under Section 3450 the automobile is given a personality and made accountable for its own wrongs, and the rights of innocent parties in the automobile are forfeited, while under Section 26 of the

National Prohibition Act the automobile is not given a personality and is not in itself made accountable for the wrong, and the rights of innocent parties are protected.

There also is a direct conflict between the old revenue per gallon system of taxation under the Revised Statutes, in support of which Section 3450 was enacted, and the provisions of Section 35 of the National Prohibition Act, 41 Stat. 317, abolishing and forbidding as to illicit liquor all advance payments of taxes through stamps and receipts.

2. Even though Section 3450 were re-enacted, it would not be applicable to the automobiles in the cases at bar, because the users of the automobiles were not distillers and therefore were not defrauding or intending to defraud the Government of a tax since the taxes under Revised Statutes were *in personam* against the distiller and not *in rem* against the liquor. Furthermore the liquor was not removed, deposited or concealed within the meaning of Section 3450, but was transported and possessed within the meaning of Section 26 of the National Prohibition Act, 41 Stat. 315. Goldsmith-Grant Company *v.* United States, 254 U. S. 505, does not hold to the contrary because in that case a violation of Section 3450 was conceded and the only question was the effect on property rights of innocent parties.

3. Congress intended and made it mandatory that the provisions of the National Prohibition Act should be applied to the offenses in the instant cases. The Government cannot proceed against the offending person under the National Prohibition Act and against the offending automobile under Section 3450 for the same act. A conviction

of the person *ipso facto* causes a forfeiture of the rights of the convicted law violator in the automobile. Innocent lienors are protected whether or not the person has been convicted.

United States *v.* One Reo Truck (C. C. A. 2) not yet reported;
United States *v.* Torres (Md.), 291 Fed. 138;
United States *v.* One Ford Coupe (C. C. A. 5) 4 Fed. (2d) 528 (Case No. 473 at bar).

4. Since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, there is no tax upon illicitly made liquor or moonshine whiskey. There being no tax, there could be no intent to defraud of a tax, and Section 3450 is not applicable. (Commercial Credit Company *v.* United States, 5 Fed. (2d) 1.)

5. The former taxes, if any survive, became in fact penalties by the adoption of national prohibition. (Fontenot *v.* Accardo (C. C. A. 5) 278 Fed. 871.) This court has never hesitated to strip a penalty of its disguise as a tax and will not hesitate to do so when otherwise the effect will be to deny citizens the constitutional guaranties afforded by the Fifth Amendment to the Constitution. (Lipke *v.* Lederer, 259 U. S. 557.)

6. The Government's brief in Case No. 473, Garth Motor Company, Claimant, clearly shows an attempt to wrest an old statute (Section 3450 Revised Statutes) out of its plain context to fit a new delinquency for which the old statute was never designed and for which a new statute (National Prohibition Act) was designed. This is being

done in utter disregard of the rights of innocent parties and of the mandate of the new statute, and to the embarrassment of the automobile industry, the largest industry in the country. The only excuse offered by the Government is some inconveniences and annoyances caused to it by the procedure required under the new act. For a cure for such defects the Government should address its plea to the legislative and not to the judicial branch of government.

1.

SECTION 3450 WAS REPEALED AND WAS NOT RE-ENACTED.

Section 3450 Revised Statutes, as applied to the facts in both cases before this court, was repealed by the adoption of the National Prohibition Law, and was not re-enacted by Section 5 of the Supplemental Act of November 23, 1921, because Section 3450 is in direct conflict with the National Prohibition Law, and especially Section 26 thereof. United States v. Stafoff, 260 U. S. 477, does not hold the contrary.

Before the adoption of the Supplemental Act of November 23, 1921, Section 35 of the National Prohibition Act repealed all laws insofar as they concerned the production of intoxicating liquor for beverage purposes, inconsistent with the provisions of the National Prohibition Act, as was definitely settled by this court in United States *v.* Yuginovich, 256 U. S. 450. While Section 3450 was not specifically mentioned, it was nevertheless involved in the general principles of law laid down in the Yuginovich case, as is shown in the thorough and precise decision of the Circuit Court of Appeals for the Sixth Circuit, in Lewis *v.* United States, 280 Fed. 5, a case in which the facts arose before the adop-

tion of the Supplemental Act of 1921. In that case the court considers and analyzes all the arguments advanced and distinctions made by the Government in its brief in the Garth Motor case now before this court, and holds that the arguments prove too much and that the distinctions were without a difference, and that as they did not preserve Section 3257 and the other sections considered in the Yuginovich case, they cannot preserve Section 3450.

See also

United States *v.* One Haynes Automobile (C. C. A. 5), 274 Fed. 926;
Reed *v.* Thurmond (C. C. A. 4), 269 Fed. 252;
Farley *v.* United States (C. C. A. 9), 269 Fed. 721;
Ketchum *v.* United States (C. C. A. 8), 270 Fed. 416.

Admittedly, therefore, on the authority of the above cited cases, Section 3450 was repealed before the adoption of the Supplemental Act of 1921, and the question now remains whether the Supplemental Act re-enacted Section 3450 in the light of the decision of this court in United States *v.* Stafoff, 260 U. S. 477.

The decision in the Stafoff case does not hold that the Supplemental Act continued in force or re-enacted all of the laws concerning liquor in force when the National Prohibition Act was enacted. To have done so would have disregarded the mandate of Congress, which expressly failed to re-enact such laws as are in direct conflict with the National Prohibition Act. In Brooks *v.* United States, 260 U. S. 481, decided by this court at the same time as

United States *v.* Stafoff, the court expressly declined to determine whether the Supplemental Act re-enacted the Revenue Laws generally, and as stated by District Judge Thomas, in United States *v.* One Bay State Roadster (Conn.), 2 Fed. (2d) 616, at page 621 (a case cited in the brief of the Government in support of its contention that Section 3450 was re-enacted)—

> "In other words the Stafoff decision does not interpret the effect of the Supplemental Act of November 23, 1921, upon the seizures provided for in Section 3450, nor does it decide whether or not the National Prohibition Act sufficiently covers the situation with reference to seizures."

The specific points decided in the Stafoff case were that the National Prohibition Act had repealed, but the Supplemental Act of 1921 had revived those provisions of the Revised Statutes which made it criminal—

1. To carry on the business of rectifier, wholesaler or retailer of liquor for beverage purposes without having paid the special tax therefor.
2. Keeping a still for the production of beverage spirits without registering it with the Collector of Internal Revenue.
3. Carrying on the business of a distiller for beverage purposes without giving bond.
4. Making mash for the production of such spirits in an unauthorized distillery.

In the case of Commercial Credit Company *v.* United States (C. C. A. 6), 5 Fed. (2d) 1, at page 6, the court says:

> "It (meaning the Stafoff decision) considers only Revised Statutes 3242, 3258, 3281 and 3282 (Compiled Statutes 5965, 5994, 6021, 6022). These sections forbade carrying on a distilling or rectifying business except upon certain conditions precedent—paying special taxes, giving bond, and registering. The court found no 'direct conflict' between these sections and the National Prohibition Act. Obviously not. There is no 'direct conflict' between a provision prohibiting an act unless after condition performed, and the provisions prohibiting it entirely. There is substantial accord. There is only that inconsistency coming from the implied permission for one to do an act if willing to perform the condition. There is in the comparison of these sections a good illustration of that mere inconsistency which was enough to work repeal under Section 35, but not enough to be the 'direct conflict' of the Willis-Campbell Act."

In at least three circuits (including a decision of the Fifth Circuit, Case No. 473, Garth Motor Company, Claimant, now before this court) and in the Court of Appeals of the District of Columbia, it has been held that the question was not decided by the Stafoff case; that there is a direct conflict between Section 3450 Revised Statutes and the National Prohibition Act, particularly Section 26 thereof, and accordingly that Section 3450 was not reenacted by the Supplemental Act of 1921; and that it is still repealed under the general principles of law laid down in the Yuginovitch case.

> Commercial Credit Co. *v.* United States (C. C. A. 6), 5 Fed. (2d) 1;

United States of America *v.* One Reo Truck Automobile (C. C. A. 2), Decision of Circuit Judge Hand filed November , 1925, not yet reported, copies of which will be handed to the Supreme Court at the argument;

United States *v.* Milstone (C. A. D. C.), 6 Fed. (2d) 481;

United States *v.* One Ford Coupe Automobile, Garth Motor Company, Claimant (C. C. A. 5), 4 Fed. (2d) 528 (Case 473 at bar).

This "direct conflict" is immediately apparent when, as was held in Goldsmith-Grant Company *v.* United States, 254 U. S. 505, it is seen that Congress in the enactment of Section 3450 construed with other revenue provisions, "ascribed to the property a certain personality, the power of complicity and guilt in a wrong. In such cases there is some analogy to the law of *deodend*," and thereby the rights and interests of innocent parties are absolutely forfeited, while under the National Prohibition Act, Congress provided punishments and remedies under Section 26 thereof, based upon modern conceptions of justice, in that they carefully protected the title and right in the property of all innocent persons, and provided for the forfeiture of the interests in the property of the convicted law violator only, as a punishment to him. Clearly, therefore, Congress made no use of the analogy of the law of *deodend* in the National Prohibition Act, and did not intend that the automobile should be considered as having a personality or a power of complicity and guilt in the wrong, as it did under the provisions of Section 3450, and in this respect it must follow that the two pro-

visions are in direct conflict, and that Section 3450 was not re-enacted by the Supplemental Act of 1921.

> "With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections. Under either he loses everything he has in the vehicle. It is otherwise with reference to the good faith mortgagee or title holder. Section 3450 says his rights shall be forfeited; Section 26 says they shall not. Could inconsistency be more clearly 'conflict' or 'conflict' more surely 'direct'?"—Commercial Credit Co. *v.* United States, 5 Fed. (2d) at page 6.
>
> * * *
>
> "Unless observance is given to the distinction we have found, Section 26 is practically without force, for in every case of illegal transportation, the Government may proceed under Section 3450 and deprive the innocent owner of the right given him under Section 26. Certainly Congress did not intend such a result. Observance of this distinction between the two acts gives full force and effect to all other provisions, and to the evident intent of Congress."—United States *v.* Milstone, (Court of Appeals, D. C.) 6 Fed. (2d) 481, at page 483.

See also

> United States of America *v.* One Reo Truck (C. C. A. 2). Not yet reported.

Furthermore, there is a direct conflict between the two statutes [Act of Aug. 27, 1894, Sec. 48, 28 Stat. 563 and Sec. 35 National Prohibition Act 41 Stat. 317] with reference to the payment of taxes, as is clearly pointed out in the decision of the Sixth Circuit, in the Commercial Credit Company case, where the tax and penalty statutes

before and since the adoption of National Prohibition are examined with great care and concerning which the court concludes (5 Fed. (2) 1 at p. 5):

> "So far as we find, there was in the old revenue laws no way of paying any per-gallon tax except to pay it by revenue stamps 'in advance' of the act which would make the liquor available for use; but now comes section 35 and prohibits the issue of any revenue stamps or tax receipts in advance.
>
> Unless we have in some respect misapprehended the system, we cannot find that the mere transporter of moonshine is under a duty to pay a per-gallon tax, which duty would make the necessary basis for his intent to defraud; and we must regard the provision of section 35, abolishing and forbidding, as to illicit liquor, all advance payments through stamps and receipts, to be in 'direct conflict' with the old system of per-gallon taxation, and hence to repeal it *pro tanto*.
>
> We do not see that this liquor can be thought of as possibly produced for nonbeverage purposes, and hence still subject to taxation on that theory. The system of producing nonbeverage spirits is surrounded by careful safeguards; the law in that respect is to be enforced by the specified punishment for disregarding these safeguards, not by inference drawn from any fiction that illicit liquor is to be considered, for convenient purposes, as if lawful."

Other conflicts between the two statutes are: Under Section 3450 the liquor seized *must be disposed of* as the Secretary of the Treasury may direct, while under Section 26, Title II, National Prohibition Act, the *court must order the liquor destroyed;* under Section 3450 all forfeited boilers, stills and other vessels and tools, etc. must be sold

under the direction of the court, while under Section 18 of Title II of the National Prohibition Act it is unlawful to advertise or sell any such utensil, contrivance, machine, etc.

It is submitted that only by fanciful interpretations and unwarranted applications of decisions of this court to circumstances that were not before this court for determination in those decisions can forfeitures be made under Section 3450 of the automobiles in question. Injustice will result to innocent parties from such forfeitures and protection accorded them under Section 26, Title II, National Prohibition Act and under the Fifth Amendment to the Constitution will be of no avail. Since the Government has a complete remedy under the National Prohibition Act, surely this court will not unnecessarily stretch a harsh and drastic statute to cover a contingency for which it was never intended.

2.

SECTION 3450 IS NOT APPLICABLE IN THESE CASES.

Even though Section 3450 were re-enacted by the Supplemental Act of 1921 (which we deny), the automobiles in both of the cases before this court are not subject to forfeiture under its provisions. Goldsmith-Grant Company v. United States, 254 U. S. 505, does not hold to the contrary.

There are at least two elements which must be present to justify a forfeiture under Section 3450: (a) the liquor must be removed, deposited or concealed and (b) with intent to defraud the United States of a tax.

Many courts, because of the definitions of the words used in Section 3450, have held that statute not applicable

to an automobile used in transporting and possessing illicit liquor or narcotics.

> United States *v.* One Buick Automobile (S. D. Cal.) 300 Fed. 584;
> United States *v.* One Buick Sedan (S. D. Cal.) 1 Fed. (2d) 997;
> United States *v.* One 1920 Premier Automobile (C. C. A. 9) 297 Fed. 1007;
> United States *v.* Mangano (C. C. A. 8) 299 Fed. 492;
> United States *v.* One Studebaker (S. D. Tex.), 298 Fed. 191;
> United States *v.* One Kissel Touring (Ariz.), 289 Fed. 120 Affd. (C. C. A. 9th) 296 Fed. 688.

The reasoning of those courts was approvingly considered by the Circuit Court of Appeals of the Sixth Circuit in Commercial Credit Company *v.* United States, 5 Fed. (2d) 1, but that court considered that it was unable to follow those decisions to an independent conclusion because of the decision of this court in the Goldsmith-Grant Company case, and concerning which case the Circuit Court said:

> "So far as the opinion shows, the record did not indicate, any more than the present one does, that the persons transporting were distillers or in collusion with them. It is true that the argument that mere transportation by a later owner is not the removal of Section 3450 was not considered in the opinion, if indeed it was presented, and it is true for this reason the Supreme Court might well regard the question as not concluded by that opinion;

> but we think we must interpret it as obligatory upon us to its full apparent extent, and requiring us to answer in the affirmative the above stated first question."

The same Circuit Court in Cadillac Automobile *v.* United States (C. C. A. 6), 7 Fed. (2d) 102—Advance Sheets November 5, 1925, said:

> "However, in the Commercial Credit Company case we discussed the question whether transportation, in the way incident to ordinary ownership, and by a person who had originally been under no obligation to pay the tax, was the removal or concealment contemplated by Section 3450. The reasons involved indicated to us a negative answer; but we felt constrained to a contrary holding because of the holding, *sub silentio*, in the Goldsmith-Grant case, 254 U. S. 505."

In this respect the Circuit Court of Appeals of the Sixth Circuit erred.

In the Goldsmith-Grant Company case Mr. Justice McKenna recited the *agreed statement of facts* upon which the case was considered as follows:—

> "That the car was used by Thompson *in violation of* Section 3450 Revised Statutes, but that such use was without knowledge of the Company (See page 509)."

And in the records on appeal in that case, which arose before Prohibition, it was stipulated between counsel—

> "On October 15, 1918 said automobile was used by the said J. G. Thompson in the removal and for the deposit and concealment of 50 gallons of spirituous liquor, with the intent on the part of the

> said J. G. Thompson to defraud the United States of taxes thereon."

The offenses for which the penalties prescribed in Section 3450 was designed are admitted in the record in the Goldsmith-Grant case, but the contention was there made that the section was not applicable to an innocent lienor of the automobile. The only question, therefore, considered by this court was whether or not the provisions of that section being otherwise applicable extended to innocent owners and lienors.

In U. S. *v.* Mangano (C. C. A. 8), 299 Fed. 492, the court said:

> "The cases of Goldsmith-Grant Company *vs.* United States, 254 U. S. 505, Logan *vs.* United States, 260 Fed. 746, United States *vs.* Mincey, 254 Fed. 287, United States *vs.* Two Bay Mules, 36 Fed. 84, do not hold to the contrary. The question of the meaning of the term 'removal' was not involved in these cases, for it was conceded on the record in each case that there had been a removal of liquor with intent to defraud the United States of a tax thereon."

Accordingly the Sixth Circuit was not obliged, because of the Goldsmith-Grant Company case, to refrain from following the decisions holding that the section was not applicable to the mere user of the automobile.

The re-enactment of Section 3450 by the Supplemental Act (which we deny) would not make that section authority for the seizure of the automobiles in the instant cases. As stated by the District Court of Southern California in U. S. *v.* One Buick Sedan (S. D. Cal.), 1 Fed. (2) 997, at page 1000:

> "But all that was done by the Congress in passing the Willis-Campbell Act was to evince an intention to overcome the effect of decisions such as the McDowell case. In effect Section 3450 was re-enacted so that it remains now as it existed before the Volstead Act. Its purposes have not been changed. It is applicable and enforceable in the same manner and to the same extent as it was before being rendered ineffectual by the National Prohibition Act. It cannot now be given new and enlarged functions unless such are justified by its terms."

In order for Section 3450 to be applicable, the goods or commodities must be removed, deposited or concealed with intent to defraud the United States of the tax. The party therefore depositing, concealing or removing the untax paid for liquor must have been responsible for the tax and guilty of an intent to defraud the Government of it. The tax, however, referred to by that section was not a tax in *rem* upon the illicit liquor, but rather a tax *in personam* against the distiller of the liquor.

> Lewis *v.* United States, 280 Fed. 5.
> Commercial Credit Company *v.* United States, 5 Fed. (2) 1.
> United States *v.* Milstone, 6 Fed. (2) 481.
> United States *v.* One Buick Automobile, (D. C. Southern Cal.) 300 Fed. 584.

In the last case, at page 588, the court said, in passing upon this point:

> "In my judgment, without intending to announce a comprehensive schedule of categories, Section 3450 may be held to apply to (a) One actually concerned

> in some way in aiding in the manufacture of illicit liquor upon which a tax is due and unpaid, and who with intent to evade the payment of such tax removes the liquor from the place where the same was manufactured, or (b) one who, acting in some way in collusion with such a manufacturer by aiding or abetting in the removal or concealment of the liquor, may have been held to have been inspired with an intent * * *."

For an excellent discussion of the procedure followed and nature of the whole transaction—the manufacture, warehousing, bottling in bond, taxing, and withdrawal of liquors—see Taney *v.* Penn Bank, 232 U. S. 174 at p. 181.

The Government's brief in case No. 473, page 31, says that the court in reaching the conclusion, in the Commercial Credit Company case, that the tax is *in personam* failed to take into account the Act of March 3, 1897, Chapter 379 (29 Stat. 626), and that the reasoning of the case loses force when Section 600-a and Section 5 of the Willis-Campbell Act are taken into consideration. Section 600-a and Section 5 were most certainly considered at length by the court in that case, but apparently the Act of March 3, 1897 was not considered, because it is not in any way applicable. That statute, however, was considered at length by the same court in Skilken *v.* United States, (C. C. A. 6) 293 Fed. 923. It there specifically mentions and reaffirms the position it took in Lewis *v.* United States, that Section 3450 was repealed, but the same reasoning it holds cannot be applied to the Act of March 3, 1897 (29 Stat. 626) because there is nothing in the Volstead Act punishing the counterfeiting of Bottling in Bond Stamps, and therefore there is no inconsistency between the two statutes; and again the

same court held that Section 3268 was not repealed for a like reason. (See Bullock *v.* United States, (C. C. A. 6) 289 Fed. 29.) In the recent case of Commercial Credit Company *v.* United States, (C. C. A. 6) 5 Fed. (2) 1, the same court, in a case arising after the enactment of the Supplemental Act of 1921, again held Section 3450 repealed. The Act of March 3, 1897 (29 Stat. 626) merely provided that whenever any distilled spirits were deposited in a warehouse or a distillery, and had been duly entered for withdrawal upon payment of a tax, or for export under bond, and the required tax paid stamps or the export stamps had been affixed to the package, the distiller or owner of the liquor might move the spirits, provided he had declared his purpose so to do in the entry for withdrawal, to a separate portion of the warehouse where under Government supervision the spirits may be drawn off, bottled and packed, and every bottle when filled should have strip stamps affixed and be packed in cases, and then immediately removed from the distillery premises. The statute and Internal Revenue Regulation 60, Sec. 982, mentioned by the Government, must now relate to non-beverage liquor only. The statute, moreover, refers only to the acts done in the distillery and for that purpose treats the owner of the liquor as being in the same class with the distiller. By no reasoning or implication can the provisions of that statute extend beyond the acts done within the distillery, so as to include the subsequent transporter or purchaser of the liquor, and that statute can have no effect upon the reasonings nor decisions of the courts holding that the tax was only *in personam* upon the distiller and not *in rem* upon the liquor, and that therefore Section 3450 was not

applicable to the mere user or transporter of the beverage liquor. Furthermore, it does not affect the reasonings nor decisions of the courts holding that an automobile transporting and possessing intoxicating beverage liquor within the meaning of the National Prohibition Act is not synonymous with an automobile removing, concealing or depositing untax paid goods within the meaning of Section 3450. The words used in Section 3450 are strictly construed and limited to their precise meanings within that statute.

One of the most exhaustive treatments of the words used in Section 3450 and which was endorsed by the Ninth Circuit Court in United States *v.* One 1920 Premier Automobile, (C. C. A. 9) 297 Fed. at 1007, is to be found in United States *v.* One Ford Automobile Truck (Wash.), 286 Fed. 204, at 205, by Judge Cushman, where he says:

> "The question for consideration is: In which sense is the word 'removed' used in this statute? . . . . To determine this question it is appropriate, if not necessary, to examine statutes in *pari materia*. The words 'removed', 'removal', and 'removing' in a similar connection, appear to have been first used by Congress in the Act of March 3, 1791 (1 Stat. 199, at p. 203). This Act provides that the 'duties' on spirits shall be 'paid or secured previous to the removal thereof from the distilleries.' (Sec. 17). If paid 'previous to such removal', there was provision for abatement of duty of two cents for every ten gallons. Provision was made for a bond to secure payment upon all 'spirits as shall be removed from such distillery.' The casks were, 'previous to the removal of said spirits', required to be branded. Entries in books of the distiller were required to show 'all the spirits, distilled at such distillery, and

> removed from the same . . . . and the places to which removed (286 Fed. at p. 206) . . . .
>
> The foregoing statutes show that the word 'removed', as used in Section 14, has reference to removal from particular, specified places designated by law. These statutes clearly show the character of the places meant, and the fact that they were not again enumerated in Section 14 of the Act of July 13, 1866, probably arises out of the fact that it was a general section, meant to cover illegal removals from all the places mentioned in the several sections of the act (286 Fed. at p. 209)."

See also

United States *v.* One Buick, (Cal.) 300 Fed. 584, at 587

United States *v.* One Buick Sedan, (Cal). 1 Fed. (2d) 997

United States *v.* Mangano (C. C. A. 8), 299 Fed. 492.

Since it has not been and cannot be shown that the automobiles in the instant cases removed, deposited or concealed the untax paid for liquor within the meaning of the section, nor that the person in possession of the automobile was responsible for the tax, it follows that it cannot be said to have been so used with intent to defraud the United States, and is therefore not subject to forfeiture under Section 3450.

National Bond & Investment Co. *v.* U. S. (C. C. A. 7); not yet reported.

Bruno *v.* United States (C. C. A. 1) 289 Fed. 649.

And cases hereinbefore cited.

3.

ACTIONS MUST BE UNDER NATIONAL PROHIBITION ACT.

The National Prohibition Act makes it mandatory that seizures and forfeitures of automobiles used to illegally transport or possess intoxicating beverage liquor should be under its provisions.

Section 26 of Title II of the National Prohibition Act provides:

> "When * * * any officer of the law shall discover any person in the act of transporting in violation of law, intoxicating liquors in any * * * automobile * * *, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or *possessed illegally* shall be seized by an officer he shall take possession * * * of the automobile * * * and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; * * * The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale shall pay all liens, according to their priorities, which are established, by intervention or otherwise * * *"

The provisions of that section are specific and mandatory, and require—

(a) That the officer upon seizing the intoxicating liquor transported or illegally possessed shall—

1. Take possession of the automobile.

2. Arrest the person in charge thereof.

3. Proceed against the person arrested under the provisions of the National Prohibition Act.

(b) The court, upon conviction of the person, shall—

1. Order the liquor destroyed.

2. Order the public sale of the automobile, unless good cause to the contrary is shown by the owner thereof.

(c) The officer carrying out the execution of the court shall—

1. After deducting certain expenses provided for in the statute, pay all liens according to their priority, which shall be established by intervention or otherwise; and further that all liens against the property sold shall be transferred from the property to the proceeds of sale.

The re-enacting clause of Section 5 of the Supplemental Act provides:

> "but if any act is a violation of any such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other."

Once a person is charged with a violation of the National Prohibition Act, or an officer finds the liquor being transported or possessed by a person in the automobile, the pro-

cedure against both the person and the vehicle must be under the provisions of the National Prohibition Act, and if the person is convicted under the provisions of that act, there is ipso facto a conviction or a forfeiture of the automobile insofar as the convicted law violator's interests are concerned.

In United States *v.* Torres, (Md.) 291 Fed. 138, the court says:

> "The person and the vehicle were convicted at one and the same time under Section 26. The plea of guilty of Torres established the guilt of the car. In other words, there has already been, as respects the automobile, a conviction for the offense under the National Prohibition Act, and such conviction is a bar to prosecution under Revised Statutes 3450."

See also—

> The Spray (R. I.) 6 Fed. (2) 414.
>
> United States *vs.* One Ford Automobile, Commercial Credit Company, Intervener, District Court of Tennessee. Not yet reported.

It follows as a matter of logic that where the rights of innocent parties must be determined under the National Prohibition Act if the law violator has been convicted, equally must they be protected under the provisions of that act where the law violator has escaped or where he has been acquitted. As was said in the case of United States *v.* One Reo Truck (C. C. A. 2), not yet reported:

> "Now Revised Statutes Section 3450, at least as matter of logic, may still be in force as against the owner and mala fide lienors, but it cannot be in force as against bona fide lienors when the offender has been convicted. That would result in a stark contradiction between the two statutes. Nor is it pos-

> sible to say that it might be in force against bona fide lienors, when the offender is not convicted. The statute cannot mean different things at different times. If it does not cover such liens when the offender has been convicted, it does not cover them when he has not. It would be preposterous to say that the failure to convict an offender exposed the bona fide lienor to a penalty from which he would be exempt in case of conviction."

This court, in the case of Coffey *vs.* United States, 116 U. S. 436, at page 443, has said:

> "It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in The Palmyra, 12 Wheat., 1, 14. Yet, where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.*"

The facts in the two cases before this court were, in the certified case, No. 611, Port Gardner Investment Company *v.* United States, that the conditional vendee of the automobile, who was charged with possession and transportation of intoxicating liquors in violation of the National Prohibition Act, pleaded guilty to both charges, and was sen-

tenced to a fine; and in case No. 473, United States *v.* One Ford Coupe, Garth Motor Company, Claimant, a libel, according to the decision of the Circuit Court, was filed against the automobile for forfeiture under Section 3450. Reference to the complaint in connection with that libel shows that one R. A. Smith, Prohibition Agent, charged Ed. Killian with violation of the National Prohibition Act as follows:

> "That at said time and place aforesaid said defendant herein named unlawfully did knowingly have in possession for intoxicating beverage purposes, certain intoxicating liquor, to wit, twenty-seven quarts of rye whiskey, of . . . then and there contained in twenty-seven quart bottles, otherwise than as authorized by the National Prohibition Act."

In other words, the person in charge of the automobile in the case in which the Garth Motor Company is the claimant was also charged with violation of the National Prohibition Act. We submit that according to the authorities and the arguments herein advanced, that in the Port Gardner Investment Company case the conviction of Nordeau under the National Prohibition Act *ipso facto* worked the forfeiture of the automobile under that Act, insofar as his interests were concerned, and it was mandatory upon the court to have the automobile sold, as provided in that Act, due regard being given to the liens and interests of innocent parties; that in Case No. 473, Garth Motor Company, Claimant, when complaint was made against Killian for violation of the National Prohibition Act, it became mandatory upon the officer to proceed against Killian and the automobile in accordance with the provisions of the National Prohibition Act and that recourse could not be had to Section 3450.

4.

THERE IS NO TAX ON ILLICIT LIQUOR.

Since the enactment of the National Prohibition Act there is no tax (as that term has been defined by this court) upon illicitly made liquor or moonshine whiskey. There being no tax, there could be no intent to defraud the payment of a tax within the meaning of Section 3450.

The Government in its brief in Case No. 473, Garth Motor Company, Claimant, argues at length that there is a present tax on illegally manufactured liquor, and therefore the automobile upon which the untax paid liquor was found was subject to forfeiture under Section 3450. The Government passes over a very exhaustive and learned discussion of this subject by the Sixth Circuit Court of Appeals in Commercial Credit Company *v.* United States, 5 Fed. (2) 1, at page 4, where it says:

> "When we inquire about a tax, the first thought is 'What tax?' In some of the cases it has been said that the tax authorized by section 35, tit. 2, of the National Prohibition Act (Comp. St. Ann. Supp. 1923, §10138½v), answered this question; but, passing the difficulty of finding an intent to defraud the Government of a tax which does not yet exist, and the doubt whether this section has any reference to a per-gallon tax, it has been authoritatively held (Lipke *v.* Lederer, 259 U. S. 557, 561, 42 S. Ct. 549, 66 L. Ed. 1061) that the assessment which may be made under this section is not one of a tax, but of a penalty for law violation. So it must be quite clear that the requirement of section 3450 that there shall be an intent to defraud 'of a tax' cannot be satisfied by finding no tax but only a penalty. R. S. §3296

(Comp. St. §6038), is in the same situation. It does not provide a precedent tax out of which one may intend to defraud the government; it provides a penalty to be assessed as punishment for wrongdoing.

"Apparently, previous statutes, like R. S. §3251 (Comp. St. §5985), were superseded by section 48 of the Act of August 27, 1894, (Comp. St. §5986); whether the lien and personal liability clauses of 3251 would survive is here immaterial. The Act of 1894 adopts and makes applicable the existing provisions of law for the payment of taxes by the use of stamps. This act levied a tax of $1.10 on each proof gallon; we do not find that it contemplated or permitted any means of collection, or payment, save through the system of selling of tax-paid stamps by the collector. It provided for payment by the distiller before removal. This statute in turn was partially superseded by section 600(a) of the Revenue Act of 1918 (40 Stats. 1105 [Comp. St. Ann. Supp. 1919, §5986e]). This provides that in lieu of all other internal revenue taxes 'there shall be levied and collected on all distilled spirits * * * that may be hereafter produced in * * * the United States * * * a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law."

"When this act was passed, the manufacture of whisky for beverage purposes or its withdrawal from bond for such purposes was lawful, except as temporarily suspended by the War Prohibition Act (Comp. St. Ann. Supp. 1919, §§3115 11/12f-3115 11/12h). The evident theory was that at the time the distilled spirits were withdrawn from the distillery or bonded warehouse, they should be classified

as for beverage, or for industrial, medicinal, etc., purposes, and the tax paid accordingly. It was at least difficult to apply this statute intelligently to 'moonshine' whisky, which never reached the contemplated point of withdrawal or classification; but then we come to section 600 of the Revenue Act of 1921 (42 Stats. 285 [Comp. St. Ann. Sup. 1923, §5986e]). This amended the last quoted statute by adding thereto: 'Provided, that on all distilled spirits on which tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon * * * to be paid by the person responsible for such diversion."

"Since the National Prohibition Act then forbade any diversion to beverage purposes or for use in an article intended for a beverage, here we have, perhaps for the first time, the clear imposition by Congress of a per-gallon tax on liquor involved in any forbidden transaction; but here, again, it seems most difficult to make application of the provision to moonshine liquor. Indeed, the amendment of 1921 cannot refer to such liquor, since the effect is confined to spirits on which the nonbeverage tax has been paid; and its apparent scope was limited to spirits which had been withdrawn for industrial or other lawful purpose and then were diverted; but even if it were otherwise applicable, we do not find in this record any charge that the persons who transported were the 'persons responsible' for the diverson. In any effort to invoke this amendment of 1921, we must observe that this illicit liquor is diverted to beverage purposes the moment it is made as much as it ever is until its use as a beverage is finally accomplished;

and it would hardly be thought that the ultimate consumer is the person intended to be taxed by the amendment of 1921, or that his act is 'deposit or concealment' under R. S. §3450.

"Were it assumed that the distiller of moonshine wished to pay the per gallon tax thereon—whatever the amount might be, $2.20 or $6.40—he would have difficulty enough in doing so, though possibly the implications of R. S. §3253 would point the way; but if the later purchaser of the same liquor wished to make this payment, would he be able to discover any way in which it could be done? If he could have done it under the old revenue laws, it would have been by the purchase of stamps and affixing them to the package, though he was not entitled to buy stamps and practically he could not have done this; but, the National Prohibition Act, §35, after providing that the act shall not relieve any one from paying any taxes imposed upon the manufacture of such liquor or the traffic in it—a provision obviously intended to retain some liability on the part of the manufacturer and trafficker but reaching no one else—proceeds: 'No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance: * * *'" So far as we find, there was in the old revenue laws no way of paying any per gallon tax except to pay it by revenue stamps 'in advance' of the act which would make the liquor available for use; but now comes Section 35 and prohibits the issue of any revenue stamps or tax receipts in advance."

On page 32 of its brief, in Case No. 473, Garth Motor Company, Claimant, the Government does say that the reasoning and decision of the Circuit Court in the Commercial Credit Company case loses force when Section 600-a of the Revenue Act of 1918 is taken into consideration. (See also discussion, page 24, *supra.*)

There has been no excise tax law upon intoxicating liquors for beverage purposes enacted by Congress since the adoption of the Eighteenth Amendment, unless such laws can be found in Section 5 of the Supplemental Act of 1921, or in the Revenue Act of 1921, amending Section 600-a. Section 600-a of the Revenue Act of 1918 (Act of February 24, 1919) to which the Government refers, became a part of the body of our laws in 1919, immediately following the ratification, but before the going into effect, of the Eighteenth Amendment. (The Amendment was ratified on January 29, 1919, to be effective one year later.) The Government was within a year to be deprived of one of its largest sources of revenue, its excise tax on intoxicating liquors. During the remainder of the time such revenue was available to the Government, Congress therefore imposed by Section 600-a a tax of $2.20 on non-beverage liquor and a tax of $6.40 on beverage liquor. The tax therein provided was to be paid under the "provisions of existing law", which were to be found in Section 3251 Revised Statutes, as amended by Act of August 27, 1894, c. 349, Sec. 48, 28 Stat. 563, where it was provided that the Commissioner of Internal Revenue should furnish suitable stamps to denote the payment of the internal tax, and that the stamps should be affixed to all packages containing distilled spirits; with a further proviso, however, that the tax should be paid *on or before the removal from the distillery or place of storage* within eight years from the date of original entry for deposit in any distillery warehouse.

Section 600a of the Revenue Act of 1918 was a statute solely in respect to the taxation of intoxicating liquors legally produced and placed in bond. At the time of its

enactment (Feb. 24, 1919), distilled spirits could be *withdrawn* from bond for either beverage or non-beverage purpose and either for domestic sale or export. The production of distilled spirits for non-beverage purposes was permitted by law but the right to import distilled spirits had been suspended since prohibition of importation was immediately effective by the War Prohibition Act of Nov. 21, 1918 (Chap. 212, 40 Stat. 1045). The prohibition, however, against the sale of distilled spirits for beverage purposes under the War Prohibition Act did not become effective until July 1, 1919. The Lever Act of Aug. 10, 1917 (Chap. 53, 40 Stat. 276) did not prohibit the sale or use of distilled spirits for beverage purposes, as is admitted in the brief for the Government in case No. 473. Section 600a was enacted Feb. 24, 1919, and was effective the next day. Accordingly when 600a was effective and in force there was no prohibition against the sale or export or use of intoxicating liquor for beverage purpose and the brief for the Government, pages 19 to 23, where it states to the contrary is in error. This error and the confusion over the maze of effective dates of the various statutes cited in the Government brief led counsel for the Government into the fallacious deductions made from the holdings of this court in United States *v.* Stafoff (260 U. S. 477), and United States *v.* Yuginovitch (256 U. S. 450). The three cases cited by the Government all involved the collection from distillers of taxes at the non-beverage rate on liquor which had been in bond before June 30, 1919, but had been removed from bond after said date without payment of the non-beverage tax. Hamilton *v.* Kentucky Distilleries (C. C. A. 6) held the non-beverage rate and not the beverage rate was assessable on liquor stolen from the warehouse;

Maresca *v.* United States (C. C. A. 2), 277 Fed. 727 (certiorari denied 257 U. S. 657), held specifically at page 743 that there was only a tax for non-beverages and not for beverage liquor under Section 600a; Goldberg *v.* United States (C. C. A. 5), 280 Fed. 89, considered Revised Statute 3244 which covered both beverage and non-beverage liquor but the court said the beverage rate was not the issue.

The decisions in all three cases are sound but do not support the contention of the Government. The non-beverage tax has remained in effect. Section 600b of the Revenue Act of 1918 suspended the beverage but not the non-beverage tax.

With the War Prohibition Act and the Eighteenth Amendment both in mind, and recognizing that intoxicating liquor for beverage purposes would soon be a thing of the past insofar as revenue was concerned, Congress adopted Section 600-b of the Revenue Act of 1918 in its enactment of February 24, 1919, in which it provided that the tax imposed by Section 600-a should not be due or payable on spirits while stored in any distillery, bonded warehouse, or special or general bonded warehouse, and which pursuant to any act of Congress or proclamation of the President cannot be lawfully sold or removed.

Congress further, in order to enforce the Eighteenth Amendment, on October 28, 1919, passed the National Prohibition Act (Chapter 85, 41 Stat. 305) and in that Act Congress went one step further by Section 35 thereof, which prohibited and forbade the issue and advance of any revenue stamps, and followed with certain penalties for the illegal manufacture of liquor. Again on November 23, 1921, in the act referred to as the Revenue Act of 1921

(42 Stat. 285), Congress further recognized that by reason of Section 600-b of the Revenue Act of 1918, a tax on beverage liquor had been suspended and that because of the National Prohibition Act there could be no tax under Section 600-a on intoxicating liquor for beverage purposes; that intoxicating liquor could no longer be *withdrawn,* as term was meant in Section 600a, for beverage purposes; that as a result persons who were in lawful possession of non-beverage liquor might *divert* such liquor for beverage purposes, without being liable for an additional tax. Therefore, to make certain that the Government received in addition to the penalties already provided a further penalty that would be equal to the tax previously provided for in Section 600-a before the adoption of the National Prohibition Act, Congress amended Section 600-a by the Act of November 23, 1921 (Chap. 136, 42 Stat. 227, 285), and made the person responsible for the *diversion* of the liquor from non-beverage to beverage purposes subject to a further penalty (called a tax) of $4.20 per gallon over and above the non-beverage rate of $2.20 per gallon which had already been paid. The tax for legal withdrawal was no more; the penalty for illegal diversion had taken its place.

As was pointed out in Commercial Credit Company *v.* United States, 5 Fed. (2) 1, the mere consumer or transporter of the liquor cannot be considered as the one responsible for diverting the liquor from non-beverage to beverage purposes, and even with greater force can it be said that he does not come within the provisions of the amendment to Section 600-a, when the liquor he is transporting or consuming is illicit moonshine liquor, always intended for beverage purposes, and therefore not subject

to being diverted from non-beverage purposes. In any event the tax, as will be argued at length under Point 5 of this brief, was in fact a penalty and not a true tax, and "the requirement of Section 3450 that there shall be an intent to defraud of a tax cannot be satisfied by finding no tax but only a penalty" (Commercial Credit Company *v.* United States, 5 Fed. (2) 1).

5.

PENALTIES AGAINST INNOCENT PARTIES ARE VOID.

Taxes on beverage liquors are penalties, and to enforce penalties against acknowledged innocent parties by arbitrary forfeiture of their property rights is a violation of the Fifth Amendment.

It must be accepted as settled law, since the decision of United States *v.* Yuginovich, 256 U. S. 462, that Congress may, under the broad authority of the taxing powers, tax intoxicating liquors notwithstanding their production is prohibited by the Federal Constitution. The nature of that tax, however, is not defined in the Yuginovich case, and its definition becomes important, as to the rights of innocent third parties in the automobiles used in transporting untax paid beverage liquor, because of the decision of this court in Goldsmith-Grant Company *v.* United States, 254 U. S. 505.

It is a fact that prior to the National Prohibition Act the taxing statutes on intoxicating liquor were for revenue, nevertheless their nature and character changed upon the adoption of national prohibition. The Circuit Court of

Appeals for the Fifth Circuit discusses Section 3450 from this angle in Fontenot *v.* Accardo, 278 Fed. 871):

> "The Act of Congress, passed to enforce the Eighteenth Amendment, is a highly penal statute. It is not a revenue measure. Whatever charges still remain upon prohibited beverage liquor, are imposed for preventing the manufacture and sale thereof. Many provisions of the old laws which had proved useful in protecting revenue, can be used effectively in preventing violations of the prohibitory act, and hence we find that Section 35 repeals the Revenue Laws only insofar as they are inconsistent with the provisions of the Act; *but the purpose of the old provisions changed upon their adoption by the new Act, so that the laws originally intended to protect revenue, by the change became laws in aid of prohibition*" (italics ours).

United States *v.* 2,000 cases of whiskey (C. C. A. 2), 277 Fed. 410;

United States *v.* American Brewing Co. (Pa.) 296 Fed. 772.

To regard the tax other than in the nature of a penalty is to impute to Congress an unconscionable and immoral intention in reenacting the taxing statute by the Supplemental Act of 1921. If Congress intended that this should be regarded as taxation in its true nature, then it proposes that the Government shall profit by the human frailties of its own citizens, and that national prosperity shall be built in proportion to national criminal degeneracy. Can it be said that Congress anticipated that the violation of the national mandate against intoxicating liquor would be profitable to the Treasury through the payment of taxes? Such an intention it is unfair to impute to Congress.

This court has never hesitated to strip a penalty of its disguise as a tax.

Child Labor Tax Case, 259 U. S. 20;
Hill *v.* Wallace, 259 U. S. 44;
St. Louis Cotton Compress Company *v.* Arkansas, 260 U. S. 346;
Helwig *v.* United States, 188 U. S. 605.

In those cases where the objections urged against the tax were that it was *excessive* to the point of being prohibitive, this court has rightly said that under such circumstances the redress was through Congress. (See Child Labor Tax Case, 259 U. S. 20.) Where on the other hand, an attempt has been made to inflict a punishment by a tax for having done a prohibited act, the tax has been regarded as a penalty. In Helwig *v.* United States, 188 U. S. 605, the court said at p. 611:

> "Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character."

And this court said in O'Sullivan *v.* Felix, 233 U. S. 318, at 324:

> "The term 'penalty' involves the idea of punishment for the infraction of a law, and is commonly used as including any extraordinary liability to which the law subjects a wrong-doer * * *."

In Lipke *vs.* Lederer, 259 U. S. 557, this court again said at page 561:

> "The mere use of the word 'tax' in an Act primarily designed to define and suppress crime is not

> enough to show that within the true intendment of the term a tax was laid. . . . . When by its very nature the imposition is a penalty, it must be so regarded. . . . . It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the Government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty."

See also Regal Drug Co. *vs.* Wardell, 260 U. S. 386.

The so-called tax upon beverage liquor must be regarded as a punishment, since beverage liquor is prohibited both by the Constitution and statutory law.

> U. S. *v.* 2000 Cases of Whiskey (C. C. A. 2) 277 Fed. 410;
>
> One Ford Touring *v.* United States (C. C. A. 8) 284 Fed. 823;
>
> United States v. American Brewing Co., (Pa., 2 Judges) 296 Fed. 772.
>
> United States *v.* 2615 Barrels of Beer (M. D. Pa.)—1 Fed. (2) 500.

Such a penalty enforced against innocent third parties by forfeiture under Section 3450 of their property rights in automobiles transporting or possessing untax paid beverage liquor is a denial of the guaranties given to them under the Fifth Amendment to the Federal Constitution. (Lipke *v.* Lederer, 259 U. S. 557); and that Congress did not intend to violate said constitutional guaranties by the enactment of the Supplemental Act of 1921 is apparent, because Congress had, under the National Prohibition Act, erected its own machinery under Section 26 of that Act, to accomplish the desired results without doing violence to the property rights of innocent third parties.

Conclusion.

It is submitted, therefore, that in respect to the forfeiture of the property rights of innocent parties in automobiles used in transporting or possessing untax paid beverage liquor, that Section 3450 was repealed by the National Prohibition Act, and that it was not re-enacted by the Supplemental Act of 1921; that persons in charge of the automobiles in question were not liable for a tax or intending to defraud the Government of the same, and were not using the automobile within the meaning of Section 3450, and that their arrest under the National Prohibition Act made it mandatory that proceedings against the automobile must be brought under the National Prohibition Act and not Section 3450; that there is no tax on illicitly made beverage liquor, and in fact so-called taxes are penalties and cannot be enforced against innocent parties without violating the Fifth Amendment of the Constitution; and that Section 3450 is not now available to the Government to secure the forfeiture of the automobiles under the circumstances in these cases. The decree of the United States Circuit Court for the Fifth Circuit in Case No. 473 (Garth Motor Company, Claimant) sustaining the order of the District Court in quashing the libel, should therefore be affirmed. The questions certified to this court by the United States Circuit Court for the Ninth Circuit in Case No. 611 (Port Gardner Investment Company *v.* United States) should be answered as follows:

Question No. 1. Answer, no. If question is considered too broad should be answered no in respect to persons

other than distillers or persons diverting liquor from non-beverage to beverage purposes.

Question No. 2. Answer, no.
Question No. 3. Answer, no.
Question No. 4. Answer, no.
Question No. 5. Answer, yes.
Question No. 6. The so-called taxes are penalties.

Respectfully,

DUANE R. DILLS,
Counsel,

Garth Motor Co., Claimant, Case No. 473.
Port Gardner Investment Co., Case No. 611.

WILLIAM S. PRITCHARD,
of Birmingham, Ala.

JOHN W. CREEKMUR,
of Chicago, Ill.

PHILLIP W. HABERMAN.

FRANK H. TOWSLEY,
of New York City.

Of counsel in Case No. 473,
Garth Motor Co., Claimant.

LOREN GRINSTEAD,

WILLIAM T. LAUBE,

JAMES A. LAUGHLIN,
of Seattle, Wash.

THOMAS E. DAVIS,
of Portland, Ore.

Of counsel in Case No. 611,
Port Gardner Investment Co.

APPENDIX.

For the convenience of the Court the following statutes are set forth below:

NATIONAL PROHIBITION ACT, TITLE II.

Chap. 85, Act Oct. 28, 1919; 41 Stat., L. 305, 315.

SEC. 26. When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise, at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the

lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with a description thereof, shall be advertised in some newspaper published in the city or county where taken, or if there be no newspaper published in such city or county in a newspaper having circulation in the county, once a week for two weeks, and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

41 Stat. L. 305, 317.

SEC. 35. All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the

manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this Act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.

SUPPLEMENTAL ACT OF 1921.

Chap. 34, Act. Nov. 23, 1921, 42 Stat. L. 222, 223, sometimes called the Willis Campbell Act.

SEC. 5. That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the commissioner that such losses did not occur as the result

of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act."

REVISED STATUTES.

Sec. 3450 of the Revised Statutes. (Removing and concealing articles with intent to defraud United States of tax—forfeiture and penalty.) Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited. And every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof

any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not more than five hundred dollars. And all boilers, stills, or other vessels, tools and implements, used in distilling or rectifying, and forfeited under any of the provisions of this Title, and all condemned material, together with any engine or other machinery connected therewith, and all empty barrels, and all grain or other material suitable for distillation, shall, under the direction of the court in which the forfeiture is recovered, be sold at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of according to law. And all spirits or spirituous liquors which may be forfeited under the provisions of this Title, unless herein otherwise provided, shall be disposed of by the Commissioner of Internal Revenue as the Secretary of the Treasury may direct.

REVENUE ACT 1918.

Act of Feb. 24, 1919, c. 18; 40 Stat. at L. 1057, 1105.

SEC. 600 (a) (DISTILLED SPIRITS—AMOUNT OF TAX—WHEN DUE.) That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law. (40 Stat. L. 1105.)

SEC. 600 (b) (SPIRITS IN STORAGE—PAYMENT OF TAX AS AFFECTED BY PROHIBITION BAN—WITHDRAWAL OF SPIRITS—LEAKAGE, ETC.—IMPORTED SPIRITS, WINES OR OTHER LIQUOR.) That the tax imposed by subdivision (a) on distilled spirits intended for beverage purposes shall not be due or payable on such spirits while stored in any distillery, bonded warehouse, or special or general bonded warehouse, and which, pursuant to any Act of Congress or proclamation of the President of the United States, cannot be lawfully sold or removed from any such warehouse during the period of prohibition fixed by such Act or proclamation; * * *.

REVENUE ACT 1921.

Act Nov. 23, 1921, Chap. 136, §600; 42 Stat. L. 285.

Sec. 600. That subdivision (a) of Section 600 of the Revenue Act of 1918 is amended by striking out the period at the end thereof and inserting a colon and the following: "*Provided*, That on all distilled spirits on which tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion.

ACT OF MARCH 3, 1897.

29 Stat. L. 626.

CHAPTER 379. An Act to allow the bottling of distilled spirits in bond.

Be it enacted * * * That whenever any distilled spirits deposited in the warehouse of a distillery having a surveyed daily capacity of not less than twenty bushels of grain which capacity or not less than twenty bushels

thereof is commonly used by the distiller, have been duly entered for withdrawal upon payment of tax, or for export in bond, and have been gauged and the required marks, brands, and tax-paid stamps or export stamps, as the case may be, have been affixed to the package or packages containing the same, the distiller or owner of said distilled spirits, if he has declared his purpose so to do in the entry for withdrawal, which entry for bottling purposes may be made by the owner as well as the distiller, may remove such spirits to a separate portion of said warehouse which shall be set apart and used exclusively for that purpose, and there, under the supervision of a United States storekeeper, or storekeeper and gauger, in charge of such warehouse, may immediately draw off such spirits, bottle, pack and case the same; Provided, That for convenience in such process any number of packages of spirits of the same kind, differing only in proof, but produced at the same distillery by the same distiller, may be mingled together in a cistern provided for that purpose, but nothing herein shall authorize or permit any mingling of different products, or of the same products of different distilling seasons, or the addition or the subtraction of any substance or material or the application of any method or process to alter or change in any way the original condition or character of the product except as herein authorized; nor shall there be at the same time in the bottling room of any bonded warehouse any spirits entered for withdrawal upon payment of the tax and any spirits entered for export; Provided also, That under such regulations and limitations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, the provisions of this Act may be made to apply to the bottling and casing of fruit brandy in special bonded warehouses.

Every bottle when filled shall have affixed thereto and passing over the mouth of the same such suitable adhesive engraved strip stamp as may be prescribed, as hereinafter provided, and shall be packed into cases to contain six

bottles or multiples thereof, and in the aggregate not less than two nor more than five gallons in each case, which shall be immediately removed from the distillery premises. Each of such cases shall have affixed thereto a stamp denoting the number of gallons therein contained, such stamp to be affixed to the case before its removal from the warehouse, and such stamps shall have a cash value of ten cents each, and shall be charged at that rate to the collector to whom issued, and shall be paid for at that rate by the distiller or owner using the same.

And there shall be plainly burned on the side of each case, to be known as the Government side, the proof of the spirits, the registered distillery number, the state and district in which the distillery is located, the real name of the actual bona fide distiller, the year and distilling season, whether spring or fall, of original inspection or entry into bond, and the date of bottling, and the same wording shall be placed upon the adhesive engraved strip stamp over the mouth of the bottle. It being understood that the spring season shall include the months from January to July, and the fall season the months from July to January. And no trade marks shall be put upon any bottle unless the real name of the actual bona fide distiller shall also be placed conspicuously on said bottle.

War Prohibition Act.

Chapter 212, 40 Stat. L. 1045.

Act of November 21, 1918, entitled "An Act to enable the Secretary of Agriculture to carry out, during the fiscal year ending June thirtieth, nineteen hundred and nineteen, the purposes of the Act entitled 'An Act to provide further for the national security and defense by stimulating agriculture and facilitating the distribution of agricultural products' and for other purposes."

Be it enacted * * * Fourth * * * That after June thirtieth, nineteen hundred and nineteen, until the conclu-

sion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, for the purpose of conserving the man power of the Nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy, it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export. After May first, nineteen hundred nineteen, until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no grains, cereals, fruit or other food product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes. After June thirtieth, nineteen hundred and nineteen, until the conclusion of the present war, and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, no beer, wine, or other intoxicating malt or vinous liquor shall be sold for beverage purposes except for export. The Commissioner of Internal Revenue is hereby authorized and directed to prescribe rules and regulations, subject to the approval of the Secretary of the Treasury, in regard to the manufacture and sale of distilled spirits and removal of distilled spirits held in bond after June thirtieth, nineteen hundred and nineteen, until this Act shall cease to operate, for other than beverage purposes; also in regard to the manufacture, sale and distribution of wine for sacramental, medicinal, or other than beverage uses. After the approval of this Act no distilled malt, vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war and period of demobilization; Provided, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act.

ACT OF AUGUST 27, 1894.

28 Stat. at L. 509 at 563.

SEC. 48. That on and after the passage of this Act there shall be levied and collected on all distilled spirits in bond at that time, or that have been or that may be then or thereafter produced in the United States, on which the tax is not paid before that day, a tax of one dollar and ten cents on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon: Provided, That in computing the tax on any package of spirits all fractional parts of a gallon, less than one tenth, shall be excluded.

The Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, shall prescribe and furnish suitable stamps denoting the payment of the internal revenue tax imposed by this section; and until such stamps are prepared and furnished, the stamps now used to denote the payment of the internal revenue tax on distilled spirits shall be affixed to all packages containing distilled spirits on which the tax imposed by this section is paid; and the Commissioner of Internal Revenue shall, by assessment or otherwise, cause to be collected the tax on any fractional gallon contained in each of such packages as ascertained by the original gauge, or regauge when made, before or at the time of removal of such packages from warehouse or other place of storage; and all provisions of existing laws relating to stamps denoting the payment of internal revenue tax on distilled spirits, so far as applicable, are hereby extended to the stamps provided for in this section.

That the tax herein imposed shall be paid by the distiller of the spirits, on or before their removal from the distillery or place of storage, except in case the removal therefrom without payment of tax is authorized by law; and (upon spirits lawfully deposited in any distillery warehouse, or other bonded warehouse, established under in-

ternal revenue laws) within eight years from the date of the original entry for deposit in any distillery warehouse, or from the date of original gauge of fruit brandy deposited in special-bonded warehouse, except in case of withdrawal therefrom without payment of tax as authorized by law.

INDEX.

CASES CITED.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 115.

THE UNITED STATES OF AMERICA,
Petitioner,

v.

ONE FORD COUPE AUTOMOBILE, No. 4776501, Alabama License No. 10978, Garth Motor Company,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 173.

PORT GARDNER INVESTMENT COMPANY

v.

THE UNITED STATES OF AMERICA.

UPON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Re-Argument on Direction of the Court.

Argued in October Term, 1925 as Cases Nos. 473 and 611.

SUPPLEMENTAL BRIEF FOR

GARTH MOTOR COMPANY, CLAIMANT, IN CASE NO. 115;

PORT GARDNER INVESTMENT COMPANY, IN CASE NO. 173.

Opinions Below.

In Case No. 115, The United States of America *v.* One Ford Coupe (Garth Motor Company, Claimant), the opin-

ion of the Circuit Court of Appeals for the Fifth Circuit (R. 14-16) is reported in 4 Fed. (2) 528.

In Case No. 173, *Port Gardner Investment Company* v. *The United States,* the decision was by the District Court for the Western District of Washington, and has not been reported. The case was certified to this court by the Circuit Court of Appeals for the Ninth Circuit.

Statement.

These cases were argued on December 9, 1925 as cases Nos. 473 and 611 of the October Term of 1925. Preceding that argument a brief was filed by the government in case No. 473, now known as No. 115, *The United States of America* v. *One Ford Coupe Automobile,* and the brief filed by us, besides advancing original arguments of our own, replied to the government brief in the *Ford Coupe case.* Immediately preceding the oral argument, the government filed another brief in case known then as No. 611, now No. 173, *Port Gardner Investment Company* v. *The United States of America,* to which we replied only at the oral argument and not by written brief, and to which summary reply will be made in this brief. It will serve no useful purpose to reiterate at length all that was said by us in our original brief, because that brief is still before the court. For the convenience of the court, however, we will re-copy a summary of the argument in that brief, and we herewith enumerate some of the important cases decided since that brief was filed.

Danciger v. *Crooks,* (D. C. Mo. W. D.) 13 Fed. (2) 642, holds that the taxes although reenacted by the Willis-Campbell Act (42 Statutes 222) nevertheless remain penalties.

Coffey v. *Noel,* (D. C. Va. W. D.) 11 Fed. (2) 399, also holds that the taxes being punitive were in fact penalties.

United States v. *One Chevrolet* (D. C. Mo. E. D.), 9 Fed. (2) 85 holds that Section 26 of the National Prohibition Act, and Section 3450 of the Revised Statutes were in direct conflict, and that the Willis-Campbell Act did not change the nature of the money exactions, constituting them penalties instead of taxes by its reenactment clause.

Marmon Atlanta Company v. *United States,* (C. C. A. 5) 8 Fed. (2) 267, reverses the decision of Judge Sibley in 5 Fed. (2) 113, and continues to follow the previous holding in *United States* v. *One Ford Coupe* (Garth Motor Company case), No. 115 at bar.

United States v. *Deutsch,* (D. C. N. J.) 8 Fed. (2) 54, holds that Section 26 of the National Prohibition Act was the only acceptable statute.

Some cases cited in our original brief were not reported at the time, but now may be found reported as follows:—

National Bond and Investment Company v. *United States,* (C. C. A. 7) 8 Fed. (2) 942.

United States v. *One Reo Truck,* (C. C. A. 2) 9 Fed. (2) 529.

The arguments advanced by us in the original brief were as follows:—

Summary of the Original Argument.

1. Section 3450 Revised Statutes, as applied to the facts in both instant cases, was repealed by the adoption of the National Prohibition Act, 41 Stat. 305 (*United States* v.

Yuginovich, 256 U. S. 450, *Lewis* v. *United States*, (C. C. A. 6), 280 Fed. 5 and was not re-enacted by Section 5 of the Supplemental Act of November 23, 1921, 42 Stat. 222, (sometimes referred to as the Willis Campbell Act), because Section 3450 is in direct conflict with the National Prohibition Act, and especially Section 26 thereof, as applied to the facts in the cases at bar. *United States* v. *Stafoff*, 260 U. S. 477, does not hold the contrary, because the questions now presented were not present in that case. (*Commercial Credit Company* v. *United States*, (C. C. A. 6) 5 Fed. (2d) 1.)

There is a direct conflict because under Section 3450 the automobile is given a personality and made accountable for its own wrongs, and the rights of innocent parties in the automobile are forfeited, while under Section 26 of the National Prohibition Act the automobile is not given a personality and is not in itself made accountable for the wrong, and the rights of innocent parties are protected.

There also is a direct conflict between the old revenue per gallon system of taxation under the Revised Statutes, in support of which Section 3450 was enacted, and the provisions of Section 35 of the National Prohibition Act, 41 Stat. 317, abolishing and forbidding as to illicit liquor all advance payments of taxes through stamps and receipts.

2. Even though Section 3450 were re-enacted, it would not be applicable to the automobiles in the cases at bar, because the users of the automobiles were not distillers and therefore were not defrauding or intending to defraud the Government of a tax since the taxes under Revised Statutes were *in personam* against the distiller and not *in rem* against the liquor. Furthermore the liquor was not re-

moved, deposited or concealed within the meaning of Section 3450, but was transported and possessed within the meaning of Section 26 of the National Prohibition Act, 41 Stat. 315. *Goldsmith-Grant Company* v. *United States*, 254 U. S. 505, does not hold to the contrary because in that case a violation of Section 3450 was conceded and the only question was the effect on property rights of innocent parties.

3. Congress intended and made it mandatory that the provisions of the National Prohibition Act should be applied to the offenses in the instant cases. The Government cannot proceed against the offending person under the National Prohibition Act and against the offending automobile under Section 3450 for the same act. A conviction of the person *ipso facto* causes a forfeiture of the rights of the convicted law violator in the automobile. Innocent lienors are protected whether or not the person has been convicted.

United States v. *One Reo Truck*, (C. C. A. 2) 9 Fed. (2) 529;
United States v. *Torres* (Md.), 291 Fed. 138;
United States v. *One Ford Coupe*, (C. C. A. 5) 4 Fed. (2d) 528 (Case No. 115 at bar).

4. Since the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, there is no tax upon illicitly made liquor or moonshine whiskey. There being no tax, there could be no intent to defraud of a tax, and Section 3450 is not applicable. (Commercial Credit Company *v.* United States, 5 Fed. (2d) 1.)

5. The former taxes, if any survive, became in fact penalties by the adoption of national prohibition. (*Fontenot* v. *Accardo,* (C. C. A. 5) 278 Fed. 871.) This court has never hesitated to strip a penalty of its disguise as a tax and will not hesitate to do so when otherwise the effect will be to deny citizens the constitutional guaranties afforded by the Fifth Amendment to the Constitution. (Lipke *v.* Lederer, 259 U. S. 557.)

6. The Government's brief in Case No. 473, now No. 115, Garth Motor Company, Claimant, clearly shows an attempt to wrest an old statute (Section 3450 Revised Statutes) out of its plain context to fit a new delinquency for which the old statute was never designed and for which a new statute (National Prohibition Act) was designed. This is being done in utter disregard of the rights of innocent parties and of the mandate of the new statute, and to the embarrassment of the automobile industry, the largest industry in the country. The only excuse offered by the Government is some inconveniences and annoyances caused to it by the procedure required under the new act. For a cure for such defects the Government should address its plea to the legislative and not to the judicial branch of government.

Summary of the New Arguments.

We believe that the particular point in the original argument, which has given the court some concern, necessitating a re-argument, is that mentioned in Argument No. 5, page 41 of our brief. There we said the taxes on beverage liquors were in fact penalties, and could not be arbitrarily

enforced against acknowledged innocent parties without violating the Fifth Amendment. Believing that it will assist the court to go more fully into that argument, we have enlarged upon it in this brief. We have also in this brief answered the argument advanced by the government in the brief filed in the *Port Gardner Investment Company case,* to which we had no opportunity to reply at the original argument and we have added a few additional authorities to Arguments 1 and 2 of our original brief. For the convenience of the court we summarize these arguments as follows:—

1. The nature and character of the revenue laws, particularly Section 3450 Revised Statutes, insofar as they relate to beverage liquors, were changed upon the adoption of National Prohibition Act, so that the laws originally intended to protect revenue (taxes) by the change became laws in aid of prohibition (penalties).

See

Fontenot v. *Accardo,* 278 Federal 871;
Regal Drug Company v. *Wardell,* 260 U. S. 386.

2. Congress intended the revenue laws as penalties only upon a prohibited business and not upon a lawful ownership of innocent conditional vendors and mortgagees of automobiles. This is evidenced by the use of the words "diverted" and "diversion" in Section 600-a, (42 Statutes 227, 285) and by the machinery set up in the National Prohibition Act for its own enforcement. Congress did not intend to confiscate the property of innocent parties as is shown by Section 26 of the National Prohibition Act.

3. The dictum in *United States* v. *Yuginovich,* 256 U. S. 450, that Congress may under the broad authority of the taxing power tax that which is prohibited is not supported by the authorities cited therein. *License Tax Cases, 5 Wallace* (72 U. S.) 462; *In re Kollock,* 165 U. S. 526; *United States* v. *Jin Fuey Moy,* 241 U. S. 394; *United States* v. *Doremus,* 249 U. S. 86, as analyzed, show them to be in support of revenue measures and not penal statutes.

4. The revenue feature has always been the controlling influence to determine whether a statute is a tax measure, and according to eminent authority should be the only influence in determining if there is a tax in fact.

D. A. Wells—*Theory and Practice of Taxation;*
Cooley on *Constitutional Limitations;*
John Randolph Tucker—*Constitution of the United States;*
Story—*Commentaries on the Constitution.*

5. The framers of the Constitution intended that the taxing power should be used for purposes of revenue only.

Jefferson's Correspondence, Vol. 4;
The Federalist.

6. The power to make money exactions as regulatory measures, such as in *Veazie Bank* v. *Fenno,* 8 Wallace (77 U. S.) 533, is to be found in the implied authority of the specific general powers given to Congress, and not in the taxing power.

Head Money Cases, 112 U. S. 580;
Cooley on Taxation;

Taxation for the Purpose of Destruction, by J. B. Waite, 6 Michigan Law Review 277;

The National Police Power under the Taxing Clause of the Constitution, by R. E. Cushman, 4 Minn. Law Review 247;

Indirect Encroachment on the Federal Authority by the Taxing Powers of the States, by Thomas R. Powell, 31 Harvard Law Review 321;

Is There a National Police Power, by Paul Fuller, 4 Columbia Law Review 563;

Covert Legislation and the Constitution, by Judge Charles M. Hough, 30 Harvard Law Review 801.

7. Where private property is taken solely as a punishment, it is under the penal power as distinguished from the taxing power of the government.

See

Seligman—*Essays in Taxation;*

The King v. *Barger* (Australian Case), 6 Commonwealth L. R. 41;

Child Labor Tax Case, 259 U. S. 20;

Trusler v. *Crooks,* 70 Law Ed. 198;

and as a penalty if enforced against innocent parties without due process of law, it is a violation of the Fifth Amendment.

Regal Drug Co. v. *Wardell,* 260 U. S. 386;

Lipke v. *Lederer,* 259 U. S. 557.

8. The arguments advanced by the government in its brief at the original argument in Case No. 173, *Port Gardner Investment Company* v. *United States,* that the tax of which the government is being defrauded is a so-called basic tax for non-beverage liquor, is unsound in view of the fact that the driver of the car was arrested and convicted for transporting beverage liquor, and the liquor cannot be considered as beverage liquor for the purposes of convicting the driver and as non-beverage liquor in order to forfeit the car. The authorities cited by the government in that brief have been either criticized or reversed.

I.

The Alleged Taxes Are in Fact Penalties.

Penalties Disguised as Taxes on Beverage Liquors Cannot Summarily and Arbitrarily Be Enforced Against Acknowledged Innocent Parties Without Violating the Fifth Amendment.

In view of the sixth certified question from the Circuit Court of Appeals for the Ninth Circuit in Case No. 173, *Port Gardner Investment Co.* v. *United States,* and in view of the fact that in Case No. 115, *United States* v. *One Ford Coupe, Garth Motor Company, Claimant,* the automobile was seized but the driver of the automobile, Killian, was not arrested, we have then for further consideration the question whether the so-called taxes under Section 600-a as amended by the Act of November 23, 1921 (Chap. 136, 42 Stat. 227, 285), are in fact penalties. We pointed out in our original brief, under Argument No. 4, at page 40,

that there was no tax under Section 600-a prior to the amendment of November 23, 1921, because liquor could not be withdrawn, as that term was meant in the section, for beverage purposes in view of the adoption of national prohibition; and that therefore the words "diverted" and "diversion" in the amendment to Section 600-a of the Act of November 23, 1921, were of particular significance; that these words showed plainly that Congress intended to penalize the persons responsible for the diversion of the liquor; that the tax for legal withdrawal was no more but that a penalty for illegal diversion had taken its place.

Admittedly the tax statutes on intoxicating liquor before the adoption of national prohibition were for revenue purposes, and were in theory and in fact taxes. As such they were properly enforced in *Goldsmith-Grant* v. *United States,* 254 U. S. 505. That case as shown in our original brief at the first argument is not controlling here. (see original brief, p. 21). Upon the adoption of national prohibition, however, and upon the re-enactment of the prior statutes by the Supplemental Act of 1921 (if it should be considered that under *United States* v. *Stafoff,* 260 U. S. 477, they were re-enacted, *contra,* see Argument 1, page 12 of our original brief), those statutes thereupon became penal statutes in aid of prohibition, instead of tax statutes for revenue purposes. The Circuit Court of Appeals for the Fifth Circuit, in *Fontenot* v. *Accardo,* 278 Fed. 871, which has been cited by this court with approval in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386, states clearly the change in the nature and character of the statutes, as follows:

> "The act of Congress, passed to enforce the Eighteenth Amendment, is a highly penal statute.

> It is not a revenue measure. Whatever charges still remain upon prohibited beverage liquors are imposed for the purpose of preventing the manufacture and sale thereof. Many provisions of the old laws which had proved useful in protecting revenue can be used effectively in preventing violations of the prohibitory act, and hence we find that section 35 repeals the revenue laws only in so far as they are inconsistent with the provisions of the act; *but the purpose of the old provisions changed upon their adoption by the new act, so that the laws originally intended to protect revenue by the change became laws in aid of prohibition.*" (Italics ours.)
>
> *United States* v. *2,000 Cases of Whiskey* (C. C. A. 2), 277 Fed. 410;
> *United States* v. *American Brewing Co.* (Pa.), 296 Fed. 772.

The theory of the Fifth Circuit that the taxes were in fact penalties was again reemphasized by this court in *Regal Drug Co.* v. *Wardell,* 260 U. S. 386. In that case among other taxes the tax now under consideration in the cases before this court had been levied against the Regal Drug Company, i. e., the tax at $6.40 per gallon, amounting in the aggregate to $115,092.50, which was the largest tax involved in that case. That tax was levied without notice or hearing to the Regal Drug Company. It was urged upon this court at that time, as it has been urged by the government in these cases, that the prior decision of this court in *Lipke* v. *Lederer,* 259 U. S. 557 was not controlling in that Mr. Justice McReynolds in that case had under consideration not a tax imposed by the revenue laws but a double penalty or tax, or a special penalty specifically imposed by Section 35 of the National Prohibition Act. This

court, however, in the Regal Drug Company case, speaking through Mr. Justice McKenna, in referring to the decision in *Lipke* v. *Lederer,* and to the consideration of the so-called tax of $6.40, said——

> "The distinction between a tax and a penalty was emphasized. The function of a tax, it was said 'is to provide for the support of the government', the function of a penalty clearly involves the 'idea of punishment for infraction of the law', and that a condition of its imposition is notice and hearing. * * * And even if the imposition may be considered a tax, if it have punitive purpose, it must be preceded by opportunity to contest its validity. Central of Ga. Ry. v. Wright, 207 U. S. 127.
>
> "We took pains to say that 'evidence of crime (paragraph 29) is essential to assessment under paragraph 35', and that we could not 'conclude in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantees of due process of law and trial by jury are not to be forgotten or disregarded. See Fontenot v. Accardo, 278 Fed. 871. A preliminary injunction should have been granted.'
>
> "The comment and decision are applicable here, and decisive. The Government concedes that the case is conclusive against the 'penalties and double taxes,' but contends that under tax laws which antedated the National Prohibition Act, only inconsistent laws are repealed, and that taxes in this case were levied under a law not inconsistent. For this paragraph 35 is adduced. Lipke v. Lederer (259 U. S. 557) manifestly precludes the contention."

The holding of this court in the *Regal Drug Company case* we submit is absolutely controlling in the cases now under consideration. If the so-called tax of $6.40 was a penalty on December 11, 1922 when the *Regal Drug Company case* was decided, it remains a penalty today because nothing has happened in the meantime to change its character or its purpose.

In *Jasper* v. *Hellmich*, 4 Fed. (2) 852, at page 854, Judge Faris said——

> "If the impositions provided for by section 35, *supra, were penalties before the passage of the Willis-Campbell Act,* and upon this point there is left by the ruled cases neither doubt nor question, what is there in the latter act to change their meaning or color? The latter act does nothing as to this; its sole office is to change, or attempt to change, the manner of their collection. They are called in this act simply 'taxes and penalties provided for in section 35 * * * of the National Prohibition Act'. No sufficient effort is made by the Willis-Campbell Act to alter or change the inherent nature of these impositions, although, as stated in the Yuginovich Case, Congress had the power to do this. If, then, Congress merely provided penalties by Section 35 as contradistinguished from taxes, obviously, and as a mere casual reading discloses, *the language of the Willis-Campbell Act,* above quoted, *cannot,* without violence, be fairly construed to *have the effect to change these penalties into taxes.*" (Italics ours.)

See also—

> *United States* v. *One Chevrolet,* 9 Fed. (2) 85; *Coffey* v. *Noel,* 11 Fed. (2) 399.

Apparently the government, in again urging upon this court the same arguments advanced by it in the *Regal Drug Company case,* hopes that this court might upon a reconsideration of the question, consider the tax of $6.40 on beverage liquor a tax in fact and not a penalty, because of the expression of this court in the case of *United States* v. *Yuginovich,* 256 U. S. 450, at page 462, in an opinion by Mr. Justice Day, in which he said,

> "• • • That Congress may, under the broad authority of the taxing power tax intoxicating liquors notwithstanding their production is prohibited and punished, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue, presents no valid constitutional objection to its enactment."

citing as authority for this statement—

> *License Tax Cases,* 5 Wallace (72 U. S.), 462, 471;
> *In re Kollock,* 165 U. S. 526, 536;
> *United States* v. *Jin Fuey Moy,* 241 U. S. 394;
> *United States* v. *Doremus,* 249 U. S. 86.

The above cited expression of this court in the Yuginovitch case is dictum because it was not absolutely necessary to determine the nature of the tax in that case in order to reach the conclusion that the prior statutes were impliedly repealed upon the adoption of national prohibition. In view of the controlling decision of this court in the *Regal Drug Company case,* that the so-called taxes are in fact penalties, it might be advisable to reconsider the above cited statement from the *Yuginovich case* as to the exercise of the taxing powers of Congress.

If a law merely imposes a tax without disclosing the indirect purpose of its imposition, it is true that the courts may have no right to declare the law unconstitutional or to examine into the motives or purpose of the legislature in adopting the tax measure.

See—

McCray v. *United States,* 195 U. S. 27;
John Randolph Tucker, *Constitution of the United States,* Vol. I, Section 218, page 465.

Where, however, the purpose is disclosed on the face of the act itself to be other than that of a tax, this court will not allow a money exaction to be made under the broad taxing powers of Congress.

See—

Child Labor Tax Case, 259 U. S. 20.

Plainly on its face Section 35 of the National Prohibition Act as amended by the Supplemental Act of 1921, and Section 600-a of the Revenue Act as amended by the Act of November 23, 1921, did not impose the tax of $6.40 as a revenue measure. That tax is exacted from the person responsible for the "diversion" of the liquor from beverage to non-beverage purposes. It is an infraction of the law to so "divert" liquor. The tax is a punishment for that infraction. The law provides no procedure for the payment of the money exaction as a tax.

Commercial Credit Co. v. *U. S.,* 5 Fed. (2) 1.

Any attempt to pay such a tax would be *prima facie* evidence of a crime. It would not be offered by the party

guilty of the "diversion" nor accepted by the government as a tax, as that term is generally understood either in the science of economics or of law.

May a money exaction be made under the broad taxing powers of Congress as a punishment for the doing of a prohibited act? If the statement of Mr. Justice Day in the *Yuginovich case* can be taken as an affirmative answer to such a question, at least the authorities cited do not support such a proposition of law. In all of the tax acts considered in those cases, the premise was either assumed or established that the statute was in fact a revenue measure.

In the *License Tax Cases,* 5 Wallace (72 U. S.) 462, the tax was not in respect to a business prohibited by Congress but was in respect to a business prohibited by certain of the states. It was a tax which on its face the Internal Revenue Act of 1864 imposed upon persons engaging in certain trades or businesses, including those of selling lottery tickets, and retail dealing in liquor. These persons were required to obtain a license. By the amendatory act of 1866 the words "special tax" were substituted in the place of the word "license". The court dismissed the argument that the granting of a license gave authority in itself to carry on the business. The business in respect to which the tax was considered was that of a lottery business in New York and New Jersey, in which states the selling of lottery tickets was prohibited, and a liquor business in Massachusetts in which state the retail sale of liquors was prohibited. The court states the question as follows:

> "The general question in these cases was: Can the defendants be legally convicted upon the several indictments found against them for not having complied with the acts of Congress by taking out and

> paying for the required licenses to carry on the business in which they were engaged, such business being wholly prohibited by the laws of the several States in which it was carried on?"

The granting of a license was considered as nothing more than a mere form of imposing a tax and to imply nothing *except that the licensee should be subject to no penalties under the national law if he paid the tax,* Chief Justice Chase said—

> "They (licenses) simply express the purpose of the government not to interfere by penal proceedings with a trade nominally licensed, if the required taxes are paid."

The licenses were treated as mere receipts for taxes. The statute was considered as a revenue measure of the national government and was not hostile or contrary to the state enactments. Congress did not exempt or protect the licensee from punishment by the state, but the payment of the tax did exempt the licensee from punishment by the national government. The national and state statutes were therefore not hostile or contrary.

There was no national mandate, like our Eighteenth Amendment, against the lottery business. The case therefore cannot be accepted as authority for the proposition that Congress may tax a business which the Constitution prohibits.

Conversely the case might be considered as authority that Congress may not tax that which the Constitution prohibits, because Chief Justice Chase emphasizes in his opinion that the payment of the tax exempted the licensee from penal proceedings by the national government for the carry-

ing on of the business. If the payment of a liquor tax should now be considered as exempting the tax payer from punishment for violating the constitutional provisions, Congress would then be able to frustrate the national mandate by the passing of a tax statute.

In re Kollock, 165 U. S. 526, involved the question of a tax on oleomargarine. The regulatory features of the statute were considered as incidental to the tax. The sale of oleomargarine was not prohibited as is the sale of beverage liquor. Oleomargarine was regulated only for the purpose of securing revenue. Chief Justice Fuller in the course of his opinion said:

> "The act before us is on its face an act for levying a tax, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, *its primary object must be assumed to be the raising of revenue.*" (Italics ours.)

In United States v. *Jin Fuey Moy,* 241 U. S. 394, the Narcotic Act was treated primarily as a revenue measure. Mr. Justice Holmes said:

> "Congress, at all events, contemplated production (of opium) in the United States and therefore the act must be construed on the hypothesis that it takes place. * * * "
>
> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of the opinion that the District Court, in treating those ends as to be reached only through the revenue measure and within the limits of the revenue measure, was right."

If the Narcotic Act instead of showing on its face that it was a revenue producing measure had primarily shown that it was enacted to prohibit or to punish, there is nothing in the decision to warrant the conclusion that it would then have been brought within the taxing power The moral end of that statute is treated as incidental to the revenue producing end.

The remaining case cited in the Yuginovich case, *United States* v. *Doremus*, 249 U. S. 86, also arose out of the violation of the Narcotic Act. It held, following the decision of the *License Tax Cases*, that the reserved police power of the state was not invaded because of the regulatory features of the statute. They were incidental means to aid in collecting the tax. They kept the traffic above-board and subject to inspection "by those authorized to collect the revenue", thereby diminishing the opportunity for unauthorized persons to sell drugs clandestinely without payment of the tax. The decision was by a divided court. The case is not authority for the proposition that Congress may under the taxing power make money exactions in respect to acts which it prohibits. The court said:

> "Considering the full power of Congress over excise taxation the decisive question here is: *Have the provisions in question any relation to the raising of revenue?*" (Italics ours.)

There seems to be some question in the minds of this court as to whether it decided properly that in the Doremus case the question had relation to the raising of revenue, and therefore that it did come within the taxing power.

In the case of *United States of America* v. *Daugherty,* 70 Law Ed. 169, at page 171, Mr. Justice McReynolds says—

> "The constitutionality of the Antinarcotic Act, touching which this court so sharply divided in United States *v.* Doremus, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in Hammer *v.* Dagenhart, 247 U. S. 251; Child Labor Tax Case (Bailey *v.* Drexel Furniture Company) 259 U. S. 20; Hill *v.* Wallace, 259 U. S. 44; and Linder *v.* United States, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

At the time of the facts in the case of *Goldsmith-Grant Company* v. *United States,* 254 U. S. 505, there was an excise tax on beverage liquor, and it was stipulated in that case that the automobile was used in violation of the statutes. The Goldsmith-Grant decision, therefore, does not have any direct bearing on the facts in the cases now before this court. (See page 21, Argument 2, of the original brief.)

The revenue feature in the statutes in the cases considered by this court has always been the controlling influence, and according to eminent authority should be the only controlling influence in determining that there is a tax in fact. D. A. Wells, in his "*Theory and Practice of Taxation*" says, in Chapter 11, page 251—

> "In short, the proposition would seem to be clear that the state cannot, without violating the simple principles of justice which prescribes equality in taxation, use its taxing power for effecting any other purpose whatever except to raise money";

and on page 254 he says further, in discussing the limitations upon the taxing power and the generic differences between tax and police powers of the government—

> " * * * The object of the taxing power is to raise money to defray the expenditures of the state, and proof and argument seem conclusive that it cannot be legitimately used for anything else. * * * The idea, therefore, of resorting to taxation for the purpose of protecting individuals against their own foolishness, enforcing morality, preventing social ills or as an instrumentality for the punishment of crime, is to pervert an agency from the one sole purpose for which it can rightfully exist to another less fit and not warranted by necessity, and presupposes an entire misconception of the principles of a free government; and all perversions of this power are certain to entail evils greater than the abuses which it is devised to remedy. * * * The manufacture and sale of spirituous liquors, in common with all other branches of business, is a legitimate subject for taxation, but *there is a broad distinction—indeed nothing in common—between taxing this business for revenue and in levying taxes with a view to preventing the business* from being transacted at all, and so preventing revenue.
>
> "Again, if the above analysis of the origin, justification and limitation of the power of taxation is correct, it would seem evident that to seek to make the occasion for the exercise of the power other than necessity, and the object anything else than the raising of money for meeting the expenditures of a government economically administered, is to strike a blow at not only good government but also at free government. (Italics ours.)

Judge Cooley in *"Constitutional Limitations"*, 6th ed., at page 598 says—

> "In the first place, taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of money from the citizens for other purposes is not the proper exercise of this power * * *. And unlimited power to make anything and everything lawful which the legislature might see fit to call taxation would be when plainly stated an unlimited power to plunder the citizens."

and also in his *"Constitutional Law," Chapter 4, page 56,* Judge Cooley says at page 57—

> "Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful."

John Randolph Tucker in *Vol. I, Section 215,* page 457 of his *"Constitution of the United States,"* says—

> "1st, It is a revenue power vested in Congress as a substitute for the eighth article of the Confederation, giving to the federal government an express power to raise its own revenue independent of state action; * * * The language imports a revenue power to lay and collect. These words are wedded and are not to be divorced. Taxes are not to be laid except to be collected, revenue is the object of the grant and none other."

and further, Section 218, page 465, he says—

> "Again, is it constitutional to use this taxing power for the purpose of suppressing a business in the country and not as a means of revenue, though

> some revenue may be derived from it? The answer seems to be clear, that a power granted as a means of raising revenue cannot be diverted from this legitimate purpose by the indirect use of it to do what Congress has no power to do by direct taxation. The end is not legitimate and therefore the law is not constitutional. It is true that where the law merely imposes a tax without disclosing the indirect purpose of its imposition, the courts may have no right to declare the law unconstitutional, though if the purpose were disclosed on the face of the act, the courts would do so."

Some text writers and some courts have loosely quoted Mr. Justice Story's "*Commentaries on the Constitution*" as authority for the proposition that the taxing power under the Constitution is not confined only to the purpose of raising revenue. These authors have erred in taking extracts out of the "Commentaries" without carefully studying the whole context. Mr. Justice Story was summarizing the conflicting views on the taxing power and was not making any expression of his own. He was careful in his introduction to this summary to say that it was merely a summary and not an expression of his own views. *In Section 958, page 708, Volume I, Story on the Constitution,* Fifth Edition, he says—

> "These 'Commentaries' require that the doctrine should be freely examined as maintained on either side, the result will be left to the learned reader, without the desire to influence his judgment or dogmatically to announce that belonging to the commentator."

Then follows a summary of the various views. See pages 708 to 715, inclusive, Sections 958 to 974. Section 961 states

the theory that a specific power cannot be used to accomplish another purpose, and thereby sacrifice the original object for which the specific power was granted. That would be a "violation of perversion the most dangerous of all, because the most insidious and difficult to resist." Vice-President Calhoun is supposed to have been one of the greatest exponents of this theory, and it is found incorporated in the exposition and protest of the Committee of House Representatives of South Carolina, on December 19, 1829, which is generally accepted to be the work of Calhoun. This view was later re-expressed to the effect that within the limits of revenue Congress could so arrange a tax as incidentally to accomplish another purpose but that it could not convert an incidental into a principal power and thus transcend the limits of revenue. Story summarizes all of the views on limitations of the taxing power in Section 963 at page 710 when he says—

> "The power to lay taxes is a power exclusively given to raise revenue, and it can constitutionally be applied to no other purpose. The application for other purpose is an abuse of the power; and, in fact, however it may be in form disguised, it is a premeditated usurpation of authority. Whenever money or revenue is wanted for constitutional purpose, the power to lay taxes may be applied to obtain it. When money or revenue is not so wanted, it is not a proper means for any constitutional end."

In the subsequent sections Justice Story assembles the contrary views, in which it is said that the commercial history of nations shows that the taxing power is often applied for other purposes than revenue; and that the taxing power under the Constitution was general and unlimited; and that

the power to pay debts, and provide for the national defense and general welfare were independent powers. Some writers think that Chancellor Kent (*Commentaries 14th ed., Vol. I, *268, p. 330*) approved the construction that the general welfare clause was independent and the most essential and the tax clause was with other clauses only an instrument to carry it into effect. This argument in other parts of his "Commentaries" Mr. Justice Story considers unsound in that he believes that the clause should be read granting the power to lay taxes "for the purpose of paying or in order to pay" debts, etc. Jefferson was the first to express this thought, later approved by Story, in his opinion on the power of Congress to establish the Bank of the United States. *See Jefferson's Correspondence, Randolph Edition, Vol. 4, pp. 524, 525.* It has been generally accepted by the courts, and the theory that the power to pay debts and to provide for the general welfare were independent powers has been authoritatively rejected.

The next view summarized is that the general welfare may be promoted by the laying of a tax other than for the purpose of raising revenue, and the wisdom or inexpediency of any such measure is no test of its constitutionality. This view has been generally attributed to Hamilton, and would seem to be disclosed in his *"Report on Manufactures", 1791. See Hamilton's Works, Lodge Ed., Vol. IV, p. 70, at p. 151.* However, when the opponents to the adoption of the Constitution advanced arguments against it on the ground that the general welfare clause in the taxing power would give the federal government unlimited power, Madison refuted these arguments. See *"The Federalist", original number XL, modern number XLI, Dawson's Edition of "The Federalist", page 285.*

The expressions of Madison at that time were understood to have the full approval of Hamilton, giving some basis for the subsequent charge that if the taxing power should be used as an unlimited means of promoting the general welfare, the framers of the Constitution must therefore have been guilty of either "premeditated folly or premeditated fraud." While "The Federalist" discusses the federal taxing power at length, there is no suggestion in it that the power was ever intended to be used for purposes other than revenue. (*See original numbers XXIX to XXXIV inclusive, modern numbers XXX to XXXVI, Dawson's Edition of The Federalist, pp. 186-230*).

The concluding view given in the Commentaries, was that the taxing power was restricted to the objects of the other enumerated powers that follow. Mr. Justice Story seemingly does criticize this view in setting it forth.

The various opinions as to the exercise of the taxing power and the limitations thereon are also reviewed in an excellent article entitled, "*The National Police Power under the Taxing Clause of the Constitution*", by Robert Eugene Cushman, in March 1920 Minnesota Law Review, *4 Minnesota Law Review 247.*

There is nothing recorded in the "*Debates of the Convention*" or in any of the writings of the framers of the Constitution at the time to show that any attempt was made in the Convention to specifically define the taxing power of the government. *See Farrand, Records of the Federal Convention, Vol. I.* It is known that Section 8 of the Articles of Confederation, which corresponds to the grant of the taxing power now in the Constitution, had made the federal government too dependent upon the states

for its revenue. This drove the framers of the Constitution to the necessity of a complete power of the national government itself to raise financial resources for the support of the government, independent of the states. It was necessary, however, for the power to be limited in such a way as to allay the fears of the people that the national government might become despotic and the state governments supine, and it was to this end that the limitations of uniformity and apportionment were inserted. With some of the other clauses, such as the right to regulate foreign trade and national currency, the people were not so much concerned at that time. The concluding clause of Section 8, Article I of the Constitution, generally called the co-efficient power, reenforces the other enumerated powers in that it provides that Congress might make all laws necessary and proper to carry the enumerated powers into effect.

Many of the controversies in which the text writers, historians and political leaders became engaged, as well as some eminent present day economists, could have been settled by giving proper consideration to the co-efficient power contained in the last paragraph of Section 8, or at least to an understanding of the implied power in the government to make money exactions in execution of the granted powers.

For instance, the conflicting views as to whether or not the imposition of tariff duties is a proper exercise of the taxing power could have been reconciled if the controversialists had recognized that the tariffs might be a proper exercise of the implied power under the power to regulate foreign commerce, or at least derived from the co-efficient power of the concluding paragraph of the article. (Com-

pare Seligman's *"Essays in Taxation"* with Wells' *"Theory and Practice of Taxation"*; Tucker's *"Constitution of the United States"* and Cooley's *"Constitutional Law"* with Story's *"Commentaries on the Constitution"* and Hare's *"American Constitutional Law"*; compare also Republican platform with statement in Democratic platform of 1892 and 1912, that "the Federal government under the Constitution has no right or power to impose or collect tariff duties except for the purpose of revenue".)

It seemed to be accepted, at least by some of the constitutional framers, that the power to regulate trade gave Congress the implied power to regulate it in any manner or by any means it thought wise. Madison in *"The Federalist", original number XLIII, modern number XLIV*, page 314, of Dawson's Edition, says—

> "Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

We submit that in adopting the Eighteenth Amendment to the Constitution there can be found in it sufficient power by implication for Congress to enact penalties or money exactions without having recourse to the taxing power. In *United States* v. *Gaffney* (C. C. A. 2) 10 Fed. (2) 694, at 696, Circuit Judge Hough said—

> "The Constitutional authority to enact sections 21-23 of title 2 of the National Prohibition Act may

> be assigned to the police power. It has been said, rather carelessly, that the United States has no police power; but the accurate way of putting it is that the United States possesses whatever police power is appropriate to the exercise of any attribute of sovereignty specifically granted it by the Constitution. * * *
>
> "Granting that, before the Eighteenth Amendment, the United States possessed no police power competent for the purpose of the decree below, when the amendment gave to the United States the powers thereby created, it gave also all the power necessary and appropriate to carry out the object of the amendment."

In this implied or in the co-efficient power would be found authority for the regulation by taxes or money levies or tariffs of many cases considered by this court and statutes enacted by Congress, rather than having recourse to the taxing power granted in the Constitution. Judge Cooley in his *"Taxation", 3rd ed., Vol. I, page 14,* says—

> "But a law, which under the name of taxation, has for its purpose only to embarrass and perhaps to destroy a certain branch of commerce * * * would seem more properly to derive its force from the authority * * * to regulate commerce * * * than to an authority conferred for revenue purposes."

It is upon this theory that John Barker Waite, in an article entitled *"Taxation for the Purpose of Destruction"* in the February 1908 Michigan Law Review, *6 Michigan Law Review 277,* develops his argument that the express power to lay taxes is not requisite to nor similar to an implied power to impose money exaction for the sole purpose of executing an express power to regulate. It is from this

angle that Mr. Waite interprets many of the cases decided by this court which have been erroneously cited by some text writers as authority for the exercise of the taxing power.

Although in the case of *Veazie Bank* v. *Fenno*, 8 Wall. (77 U. S.) 533 this court lays down the rule that the judicial cannot prescribe to the legislative department limitations upon the exercise of its taxing powers, nevertheless that case was decided not under the taxing power clause of the Constitution but under the power to provide for and protect the national currency.

Mr. Justice Miller in the *Head Money Cases*, 112 U. S. 580 at 596, said—

> "In the case of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549, the enormous tax * * * was upheld because it was a means properly adopted by Congress to protect the currency * * * It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

See also *National Bank* vs. *United States*, 101 U. S. 1.

Possibly Mr. Justice Holmes will not accept this interpretation and he may believe the *Veazie Bank case* was decided under the taxing powers. See dissenting opinion in *Hammer* vs. *Dagenhart*, 247 U. S. 251, 277.

Woodruff v. *Parham*, 8 Wallace (75 U. S.) 123, 138 is also authority for the statement that *Almy* v. *California*, 24 Howard (65 U. S.) 169, was not decided as a tax case under the taxing power but rather in reference to the power to regulate commerce, and came within *Crandall* v. *Nevada*, 6 Wallace (73 U. S.) 35.

It is submitted that in applying the power to make money exactions under the implied power inherent in the granted power to regulate commerce or protect the currency, or in applying the co-efficient power contained in the concluding part of the article, no undue restrictions are placed upon the taxing power. Nor will any such restrictions result if the implied power to make penalties contained in the constitutional grant of the Eighteenth Amendment is made use of instead of the power to tax under the taxing power. The words in the taxing power "to provide for the common defense and general welfare" is a statement of the objects for which money raised by taxation may be spent rather than a statement of the objects or purposes for which the power to tax may be used, irrespective of revenue. To regard the power of taxation as in its very nature limited to the purposes of revenue is not to deny or disguise the truth of Marshall's famous dictum in *M'Culloch* v. *Maryland*, 4 Wheat. 316, that "the power to tax is the power to destroy".

> "The two propositions are entirely compatible. This oft quoted maxim, instead of being regarded as a blanket authorization for the unrestrained use of the taxing power for any and all purposes irrespective of revenue, is more reasonably construed as an epigrammatic statement of the political and economic axiom that since the financial needs of a state or nation may outrun any human calculation, so the power to meet these needs by taxation must not be limited even though the taxes become burdensome and confiscatory." (See *"The National Police Power under the Taxing Clause of the Constitution", 4 Minn. Law Review, 247, at page 254*).

See also article by Professor Thomas R. Powell—*"Indirect Encroachment on the Federal Authority by the Taxing Powers of the States", Jan. 1918—31 Harvard Law Review, 321.*

The framers of the Constitution never intended that the taxing power should be used for other than revenue purposes, for they built the national government upon the principle of enumerated powers. They never intended that Congress under the guise of the power to lay taxes should exercise the police power. Otherwise there would have been stored up in that power a substantial fund of congressional authority far-reaching in its scope to deal wtih social and economic problems. (See article by Judge Charles M. —Hough, *"Covert Legislation and the Constitution"*—June, 1917—*30 Harvard Law Review 801.* Also article by Paul Fuller, *"Is There a National Police Power"*—1904—*4 Columbia Law Review 563.*) Had the framers intended that the taxing power could be used for police measures, they would have swept away by this one specific grant most of the other limitations upon the scope of federal authority.

> "Had the framers of the federal Constitution even so much as dreamed that the government to be established under it * * * would levy taxes to prevent the payment of taxes, the Constitution itself would never have been called into existence and the great American republic would never have had a history". (See Wells' *"Theory and Practice of Taxation"*, Chapter 11, page 267). See also article *"Tyranny in Taxation"* by Theodore Bacon in *"The New Englander", July 1867, Vol. XXVI, p. 442, at 457.*

The debate on the limitations of the taxing power has been further accentuated because of the difference of opin-

ion as between the exercise of the police power as distinguished from the taxing power. Cooley in his treatise on "*Taxation*" considers the difference to be one of substance and not of form, (See Cooley on *Taxation, Fourth Edition, Vol. 1, Section 27, Page 95,* and *Vol. 4, Section 1784, Page 3511*) while Professor E. R. A. Seligman in his "*Essays in Taxation*" believes that the whole distinction rests upon a confusion and upon legal expediency.

Professor Seligman, however, recognizes a further classification of money exaction as an exercise of the *penal power* as distinguished from any and all other powers including the taxing power which we have been analyzing. In his "*Essays in Taxation*", Revised, Chapter 14, page 401, he says—

> "In taking the property of individuals the sovereignty of the modern state manifests itself in different ways. The government may exercise in turn the power of eminent domain, *the penal power,* the police power or the taxing power. * * * (Italics ours.)
>
> "The second sovereign power of fiscal importance is the penal power, or right of inflicting fines and penalties, known technically as the power of sanction. This might be declared a part of the police, or regulative power of the state, since every government regulation must carry with it the power of enforcement. But on account of the decidedly problematic fiscal importance of the police power, it seems better to separate them. The power to adjudge fines and penalties, however, while often quite important as a source of revenue, belongs rather to penalogy and administration than to the science of finance; *for the private property is here taken,* not in accordance with the needs of the state or with any principles of equality or uniformity or benefits or compensation,

> but *solely as a punishment inflicted on an individual.* * * * Fines and penalties thus form by themselves a class of compulsory revenues levied according to definite or non-fiscal principles. It is obviously wrong to class them with fees as do some writers or to ignore them entirely as do others." (Italics ours.)

Mr. Justice Miller in his "*Lectures on the United States Constitution", page 235,* states the definition of a tax as given by practically all of the authorities when he says—

> "The definition by both Webster and Story is that a tax is a *contribution* imposed by government on individuals for the service of the state",

and Justice Isaacs in his dissenting opinion in *The King* v. *Barger,* 6 Commonwealth, L. R. 41 at page 99, correctly states that *a penalty is never spoken of as a contribution.*

The case of *The King* v. *Barger,* decided by the high court of Australia in 1908 was an action under an excise tariff of 1906 for a failure to comply with conditions specified in that act as to the remuneration of labor. It was urged against the act that it was not one for revenue, but in fact was a penalty, and therefore not within the taxing powers of the Commonwealth of Australia. (See 6 Commonwealth L. R. 41 and 44.) The action came before that court by demurrer to the claims of the government. The excise act provided certain duties with the proviso that it would not apply to goods manufactured under conditions as to remuneration of labor which were declared by resolution of both Houses of Parliament to be fair and reasonable, or which were in accordance with the terms of an agreement or award under the Commonwealth Conciliation Act of 1904. The question was stated as one whether this

was an act under the taxing powers of the Commonwealth or a penalty which attempted to exercise the police powers reserved to the states. Sir Samuel Griffiths, Chief Justice, and Justices Barton and O'Connor held that the excise act was void as an attempt to use penalties to regulate intrastate business, while Justices Isaacs and Higgins dissented on the ground that the statute on its face was an exercise of the taxing power and under the doctrine of *McCray* v. *United States*, 195 U. S. 27, the judiciary had no right to go behind the face of the act. Justice Isaacs, 6 Com. L. R. 41 at page 54, does however state—

> "The difference between a pecuniary penalty and a tax is that the former is a sum required in respect to an unlawful act, and the latter is a sum required in respect to a lawful act."

The decisions of the United States Supreme Court are closely analyzed in both majority and minority opinions of the high court of Australia. While that case was decided before the *Child Labor Tax Case*, 259 U. S. 20, nevertheless the same result was reached, with the exception that the majority opinion in the Australian case claimed for the judiciary the right to make an inquiry into the purpose of an act as distinguished from a search as to the motives of the legislature, and held that this amounted to nothing more than looking to the substance and not to the form of the act. From this point of view the majority opinion regarded the Australian act on its face as an unwarranted exercise of the taxing power. The court said (6 Commonwealth L. R. 41, at page 74):

> "Now, it is clearly within the competence of a State legislature to regulate conditions of labour em-

ployed in the manufacture of agricultural implements. It is equally clear that a State legislature, having prescribed such conditions, could impose a pecuniary burden upon everyone who did not conform to them, and that the payment might be made proportionate to the number of articles produced. Yet, if such payment were a duty of Excise, the State could not impose it, for the power of Parliament to impose duties of Excise is exclusive. Such an Act might be framed in several different ways. It might be prescribed that certain conditions as to remuneration of labour should be observed in the manufacture, and that any manufacturer who failed to comply should be liable to a penalty of so much for every article manufactured. Or, without formally prescribing any such condition, it might provide that any manufacturer who did not observe certain conditions should be liable to a penalty of so much per article. Or it might, instead of using the word penalty, say that the manufacturer who did not comply with certain conditions should be bound to pay a licence fee, the amount of which should be computed at so much for every article manufactured. Or it might provide that every manufacturer should at his option either comply with certain prescribed conditions or pay to the State Treasurer a sum computed etc., and in default should be liable to the penalty of etc. Or, finally, it might provide that any manufacturer who did not comply with certain specified conditions should pay a tax at a specified rate. In all the cases supposed the substance would be the same, though the form would differ. * * * In any of the cases supposed, the purpose of the Act, apparent on its face, whatever attempt might be made to disguise it in the Title, would be, not to raise money for the purposes of government, but to regulate the conditions of labor. From this point of view an inquiry

> into the purpose of an Act, is not an inquiry into the motives of the legislature, but into the substance of the legislation. And for the purpose of determining whether an attempted exercise of legislative power is warranted by the Constitution regard must be had to substance—to things, not to mere words."

And further, at pages 76 and 77, the court continues—

> "It is, however, suggested that, so regarded, the regulation is not in the nature of a law, since the concept of law imports that the legislature can and does visit its displeasure upon those who disobey its commands or fail to comply with its wishes. This visitation is called the 'sanction' of the law. If the mode in which the displeasure is visited is by imposition of a pecuniary liability, it cannot be material whether that liability is enforceable in one Court as a debt or in another court under the name of a penalty. The sanction is the same in substance, and equally effectual, in either case. If this were not so, the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth, by the simple method of imposing a pecuniary liability on everyone who did not conform to specified rules of action and calling that obligation a tax, not a penalty.

This court has come to recognize the classification of a money exaction as a penalty under the penal power or implied power as distinguished from a money exaction as a tax under the taxing power.

See—

Child Labor Tax Case—259 U. S. 20;
Regal Drug Co. v. *Wardell*—260 U. S. 386;
Lipke v. *Lederer*—259 U. S. 557;

Hill v. *Wallace*—259 U. S. 44;
Trusler v. *Crooks*—70 Law Ed. 198;
Helwig v. *United States*—188 U. S. 605;
O'Sullivan v. *Felix*—233 U. S. 318;
St. Louis Cotton Compress Co. v. *Arkansas*—260 U. S. 346.

Mr. Chief Justice Taft in the *Child Labor Tax Case*, 259 U. S. 20, said:

> "The difference between a tax and a penalty is sometimes difficult to define and yet the consequences of the distinction in the required method of their collection often are immediate. Where the sovereign enacting the law has power to impose both tax and penalty the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment."

The Solicitor General in an effort to differentiate between a tax and a penalty in that case, admitted in his brief—

> "It may not be easy to draw a line of demarcation between a penalty and a tax, but the line of

demarcation seems to be that, *where the statute prohibits the doing of an act and as a sanction imposes a pecuniary punishment for violating the act, then it is a penalty, and not a tax at all;* but where the thing done is not prohibited, but, with respect to the privilege of doing it, an excise tax is imposed, it is none the less a tax, even though it may be, in its practical results, prohibitive. • • • Where the excise tax is prohibitive in amount, there may be little practical difference between an excise tax and a penal prohibition; but, theoretically, they are different exercises of governmental power". (Italics ours.)

The Child Labor Tax case distinguished *McCray* v. *U. S.*, 195 U. S. 27. The question there, it said, involved the excessiveness of the tax. The only redress as to this was an appeal to the legislature, for Congress might impose a tax burden as and where it would, and that the court would not inquire into the motives of Congress unless the tax measure clearly shows on its face that it is something other than a tax measure. To the same effect see *Hill* v. *Wallace*, 259 U. S. 44.

An understanding of the expression "on its face" might be more clearly had from a study of that expression by Chief Justice White when he used it as a Senator in the United States Senate rather than from the McCray case itself. There he said, that as a legislator he might know the purpose of an apparent revenue bill, and, therefore, it would be to him "subjectively unconstitutional", while if he passed upon the same bill as a judge he would have to look at it "objectively", regardless of the motives that entered into it to determine whether on its face it was a revenue measure. *(See Congressional Record, July 21,*

1892, Vol. 23, 6518-6519). See also statement of President Cleveland on his approval of the Oleomargarine Tax, 1886, Richardson's *"Messages and Papers of the President," Vol. 8, page 407.*

The latest decision of this court on this subject is *Trusler* v. *Crooks,* decided January 11, 1926, and appearing in 70 Law Ed. 198. The Future Trading Act imposing a tax on trade privilege or option for contract for grain, was held to be an imposition of a penalty under the guise of taxation and unconstitutional. The case followed the doctrine laid down in *Hill* v. *Wallace, supra,* and reached its conclusion after considering that the statute could not have been one for purposes of revenue.

In *Helwig* v. *United States,* 188 U. S. 605, where the words "further sum" were alleged to impose a duty because of a violation of the under appraisement of imported goods, the "further sum" so exacted was termed a penalty because it was exacted for the punishment of the violation of the under appraisement. The court in that case said—

> "Whether the statute defines it (a money exaction) in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character."

In *O'Sullivan* v. *Felix,* 233 U. S. 318, the question involved was whether a state statute of limitations against a suit for damages controlled or whether the federal statute of limitations for a penalty controlled. The action was for an assault upon a voter, committed in violation of a federal statute. This court held that the penalty provided was to be distinguished from the remedial provisions of the statute, in that a penalty was a punishment, while a

remedial provision was a redress in the form of damages for a private wrong. The court said—

> "The term 'penalty' involves the idea of punishment for an infraction of a law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer."

The only case which seemingly might be cited as authority for the proposition that a tax on a prohibited business was not a penalty was *Hodge* v. *Muscatine County*, 196 U. S. 276, decided by a divided court. The case involved the sections of an Iowa statute imposing a tax on the real property of the owner thereof where cigarettes were sold and for the sale of which cigarettes the guilty party was to be fined and imprisoned. The majority opinion of this court said—

> "It is not easy to draw an exact line of demarkation between a tax and a penalty, but in view of the fact that the statute denominates an assessment a 'tax', and provides proceedings appropriate for the collection of a tax, but not for the enforcement of a penalty, and does not contemplate a crimnnal prosecution, we cannot go far afield in treating it as a tax rather than a penalty. * * *"

This court in that case felt constrained to follow what it thought to be the opinion of the highest court of Iowa, reported in 121 Iowa 482, that the money exaction was a tax and not a penalty, and said, 196 U. S. 276, at 279—

> "This being the latest expression of opinion of the Supreme Court of Iowa, we accept it for the purposes of this case."

It was not necessary, however, and it did not hold precisely that the money exaction was in the nature of a tax, because the only question presented to it was whether or not property was taken without due process of law. Under the provisions of the statute the landlord was given his right to his day in court, and it was therefore held that the money exaction, whether a tax or a penalty, was not taken without due process of law.

This same statute, which this court hesitated to designate either as a tax or a penalty, came again before the highest court of Iowa in *Taft* v. *Alber,* 185 Iowa 1069, to determine whether or not the act was unconstitutional as a taxing measure because it failed to conform with the state constitution in distinctly stating the tax and the object to which it was to be applied. The Supreme Court of Iowa held the measure constitutional because it was not a tax but rather was a penalty, and therefore did not need to conform to the specific requirements of the constitution. The Iowa court said (185 Iowa Reports 1069, at page 1071)—

> "It is claimed that the statute is an attempted exercise of the taxing power, and an attempt to impose a tax upon property and person for revenue; * * * A tax, in the broad sense, is for the purpose of raising revenue, and the revenue, when raised, is intended to meet the specific demands of the government. * * * It is through the taxing power that revenue is produced. * * * To impose a tax for no specific purpose is to provide revenue for no specific purpose. * * * Yet these general needs can be approximately determined, though the amount cannot be definitely known. So the levy of taxes for general purposes is sufficiently definite in scope and pur-

pose to limit the revenue collected by means of the tax to a specific and definite purpose.

* * * * * * *

"So it follows that, if this statute were enacted upon the general taxing power, and for the purpose of raising revenue for the support of the government, we would be compelled to hold with the appellant, and say that it does not come up to the requirements of the provision of the Constitution hereinbefore quoted. This, however, we cannot do. No doubt, the legislature, recognizing, or thinking that it recognized, an evil in the traffic in cigarettes, felt that the public good demanded that the restraining hand of law be placed upon the traffic. Thereupon, the legislature, in its seeming wisdom, enacted Section 5006 of the Code of 1897, through which it undertook to prohibit this sort of traffic, and provided a penalty for any violation of its inhibition. The thought of the legislature evidently was that the traffic in cigarettes was inimical to the public good, and ought to be suppressed. The traffic was made unlawful. This unlawful traffic was carried on in buildings not owned by the person carrying on the illegal traffic. The thought of the legislature seems, then, to have been that, as an additional deterrent to the unlawful business, a penalty ought to be exacted of any person who allowed his building to be used for the unlawful purpose; and so the penalty of $300 was imposed upon a person so permitting it to be unlawfully used, and upon the property permitted to be used. *This was in no sense a tax for revenue, though it may afford revenue. Its primary purpose was, not to secure revenue, but to aid in the enforcement of the inhibition found in Section 5006.* (Italics ours.)

And in *State ex rel Kern* v. *Emerson*, 90 Washington 565, the court considered the nature of the so-called "Red Light" statute and the "Mulct" liquor laws, as passed upon by the several state courts, and at page 572 says—

> "It will not be contended that an owner without notice is liable to pay the charge upon his property if it be a penalty. But it is said that the imposition is a tax which the owner must pay as a 'deterrent' * * *.
>
> "*A penalty cannot be converted into a tax by naming it a tax.* The character of the imposition depends upon the purpose and objects of the law, and its results as they affect persons and property. A tax is a thing general in its application, a charge upon persons or property or classes of property. * * * Whereas, *a penalty is a thing imposed by way of punishment for the violation of some statute.* * * * *Such a charge is always held to be a penalty when laid upon the innocent.* The distinction between a tax and a penalty has been drawn in many decisions. They are cited in Words and Phrases under the titles 'Tax' and 'Penalties'.
>
> "But to inquire whether such a charge, as is here imposed, is a tax or a penalty is a splitting of hairs, for the cigarette cases cited are not in conflict with our holding. * * *
>
> "If a man rents his home, he has done a thing that he has a lawful right to do. If his tenant puts the property to an unlawful use, the tenant is guilty, but the penalty of his wrong-doing cannot be put upon the landlord unless he knew of the intended use, or the facts and circumstances are such as to make him, constructively, a party to the crime.
>
> "*So that, assuming a penalty may be imposed upon one who is truly or constructively guilty of maintaining a nuisance, it does not follow that one*

> *who is not a party to it in any way can be charged. To do so would be to take the property of an unoffending citizen without due process of law.* * * *
>
> "The question is new and an open one in this state. We may reasonably expect that the law will be vigorously enforced and that the question discussed will frequently recur. For this reason, we have endeavored to reason it out along the lines of common sense and well established principles and as, we believe, the legislature intended. *Any other conclusion would put the penalty, not upon the prohibited business, but upon rightful and lawful ownership of property.* * * * (Italics ours.)

In the case of a money exaction in the nature of a penalty, there is no benefit either to the government or to the person from whom the exaction is made. It is not based upon the needs of the state or upon any of the principles of government taxation, but it is inflicted as a punishment against the offending individual upon non-fiscal principles. All of the authorities on public finance and economics are in accord in saying that there must be a state necessity for the money and it must be used for a public purpose in order to constitute a tax. Professor Seligman is authority for the statement that there must be a benefit—a common benefit in the case of a tax and a special benefit in the case of a fee, and Judge Cooley in his work *"Constitutional Limitations"*, 6th ed., at page 613, says—

> "When taxation takes money for the public use, the tax payer receives, or is supposed to receive, his just compensation in the protection which government affords * * *."

It would be preposterous to say that there is a common benefit to the public by the payment of a money exaction as a punishment for disobedience of the law; and certainly no one would claim that a criminal making the payment derived any special benefit. If accepted as a tax, it must be a tax on crime. This would be repugnant to the idea of securing revenue as an enforced contribution to good government.

In the *License Tax Cases* the money exaction was not made as a punishment. No federal law was violated. It was the state that had legislated against the lotteries and retail liquor sales, and in that case it was recognized that the tax could not have been levied in connection with a violation of a federal law, as a tax on crime is incompatible with revenue of a government of civilized people. No free government could afford to profit by the human frailities of its own citizens. The court in that case said, 5 Wall. 462, (72 U. S.), at page 469—

> "It is not necessary to decide whether or not Congress may, in any case, draw revenue by a law from taxes on crime. There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard; but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature",

and Cooley in "*Constitutional Limitations*", 6th ed., page 598, says—

> "Everything that may be done in the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized

> will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principles of constitutional government."

It is not necessary to impute any intention to Congress to tax crime or to unlawfully confiscate property in the cases now before this court. Congress has respected the rights of its law abiding citizens. It has specifically provided for them in Section 26 of the National Prohibition Act. It never intended that this old statute (Section 3450 Revised Statutes) should be wrested out of its plain context and applied to innocent parties in utter disregard of their rights simply because the administrative branch of the government might find it more expedient in meeting a new delinquency. Congress has clearly shown its intention to penalize the prohibited business and not the lawful ownership of property of the innocent conditional vendors and mortgagees of automobiles. This may be seen by the language used in the tax acts, (diverted and diversion) and the machinery set up in the Prohibition Act for its enforcement.

II.

Additional authorities to Arguments 1 and 2 of our original brief.

As authority in addition to those cited in support of our Argument No. 1, on page 12 of our original brief, that Section 3450 was repealed and was not re-enacted by the Willis-Campbell Act, and that *United States* v. *Stafoff*, 260 U. S. 477, does not hold the contrary, we would like to add

the well reasoned decision of Judge Faris in *United States* v. *One Chevrolet*, 9 Fed. (2) 85, where he says at page 87 and page 88—

> "But I am forced to conclude that, on the state of facts here presented, there is an irreconcilable conflict between title 2, Section 26, and Section 3450, and that upon these facts title 2, Section 26, supra, applies, and Section 3450, supra, does not apply. * * *
>
> "It is true, that none of these cases considered the effect, if any, of the Willis-Campbell Act (42 Statutes 222) as construed by the Supreme Court in the case of United States *v.* Stafoff, 260 U. S. 477. But my own view is that the latter case in no wise affected the correctness of the rulings in the cases last above cited. I have not been able to find anything, either in the Willis-Campbell Act, or in the Stafoff case, which in any logical sense militates against the conclusions reached by the several Courts of Appeal, or against the views which I am constrained to take here. This is so, not only for the reasons I have tried to point out, but for those I lately announced in the case of Jasper *v.* Hellmich, 4 Fed. (2) 852."

Also, we would like to add as further authorities to our Argument No. 2, page 19, at page 23, etc., of our original brief, the decision of this court in *United States* v. *Katz*, 70 Law Ed. 554, and *United States* v. *Jin Fuey Moy*, 241 U. S. 394.

In our original brief we pointed out (page 23, etc.) that the tax was *in personam* against the *distiller*, and that a severe statute like Section 3450 could not be extended so as to include the mere *transporter* of the liquor. We believe the above authorities of this court will further support our

argument that the statute should be limited to those specifically named. Otherwise it leads to the absurd result of confiscating property of innocent parties, and from a consideration of all the legislation on the subject, it would be evident that the legislative purpose is satisfied by the limited interpretation in applying the statute to distillers only.

III.

Reply to government's brief in Port Gardner Investment case at original argument.

At the original argument there was served upon us by the government the day preceding the oral argument a brief in *Port Gardner Investment Company* v. *United States.* We did not have time to file a written reply to that brief. A subsequent examination of the brief, however, revealed the weakness of many of the authorities cited therein.

The reasoning of Judge Sibley in *United States* v. *One New Marmon Automobile,* 5 Fed. (2) 113, is quoted from at length on pages 31 to 34 inclusive of the government's brief. The decision of Judge Sibley in that case, however, has since been reversed. See—

> *Marmon Atlanta Company* v. *United States* (C. C. A. 5), 8 Fed. (2) 267.

The soundness of the decision of Judge McDowell in *United States* v. *Turner,* 266 Fed. 248, quoted from on page 22 of the government's brief, has been questioned in *Ketchum* v. *United States* (C. C. A. 8), 270 Fed. 416, at

page 420, and it is said to be in conflict with the Circuit Court in *Reed* v. *Thurmond* (C. C. A. 4), 269 Fed. 252, in which circuit the court over which Judge McDowell presides is located. Judge McDowell's decision was also criticised as not convincing in *United States* v. *Fredericks* (D. C. N. J.), 273 Fed. 188, at page 189; and in the *Yuginovich* case, 256 U. S. 450, at page 462, it was cited as being contrary to the final decision of this court in the *Yuginovich* case. It is interesting to note that Judge McDowell in the recent case of *Coffey* v. *Noel*, 11 Fed. (2), 399, now regards the taxes imposed by Section 600-a of the Revenue Act as in fact penalties.

The decision of Judge Lindley in *United States* v. *One Cadillac*, 292 Fed. 773, from which quotations are cited in the government brief at page 30, was criticized by Judge Hutchinson in *United States* v. *One Studebaker*, 298 Fed. 191, at page 193, as being unsound and he refused to follow it.

The brief filed by us at the original argument was really in reply to the government brief in *United States* v. *One Ford Coupe*, and in that brief the government had tried to make out a case that the tax of which it had been defrauded was that of $6.40 on beverage liquor. In our original brief we pointed out that this was due largely to confusion in the mind of counsel for the government as to the tax statutes, because of the maze of the effective dates in the various statutes cited (See our original brief, pages 36 to 41 inclusive, and pages 24 to 26). Apparently dropping this argument, then, upon the tax of $6.40 for beverage liquor, the government in its Port Gardner Investment Company brief subsequently filed, stresses its contention that the tax of which it had been defrauded was the basic tax of $2.20

for non-beverage liquor. In the Port Gardner Investment Company case, however, the driver of the automobile, Luther L. Neadeau, had been convicted of transporting beverage liquor. It seems to border on the fantastic to allege that the automobile driven by Neadeau was defrauding the government of a tax on non-beverage liquor, and at the same time convict Neadeau for transporting the same liquor as beverage liquor. This same argument was advanced by the government in practically all of the cases before the Circuit Courts but was not accepted, and most certainly was urged in the case of *Commercial Credit Company* v. *United States,* 5 Fed. (2) 1, where at page 5 the court said—

> "We do not see that this liquor can be thought of as possibly produced for non beverage purposes, and hence still subject to taxation on that theory. The system of producing non beverage spirits is surrounded by careful safeguards; the law in that respect is to be enforced by a specified punishment for disregarding these safeguards, not by inference drawn from any fiction that illicit liquor is to be considered, for convenient purposes, as if lawful."

In stressing such an argument, counsel for the government has failed to be guided by the principle announced by this court in *United States* v. *Katz,* 70 Law Ed. 554, at page 556, where it says—

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

Respectfully,

DUANE R. DILLS,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 115

THE UNITED STATES OF AMERICA,
Petitioner

V.

ONE FORD COUPE AUTOMOBILE, No. 4776501, Alabama License No. 10978, Garth Motor Company, Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Re-Argument on Direction of the Court

Argued in October Term, 1925, as Cases Nos. 473 and 611

SUPPLEMENTAL BRIEF OF WILLIAM S. PRITCHARD, AND JOHN D. HIGGINS, ATTORNEYS FOR GARTH MOTOR COMPANY, CLAIMANT

Birmingham Pub. Co.—10-11-26—50

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 115

THE UNITED STATES OF AMERICA,
Petitioner

·V.

ONE FORD COUPE AUTOMOBILE, No. 4776501, Alabama License No. 10978, Garth Motor Company,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Re-Argument on Direction of the Court

Argued in October Term, 1925, as Cases Nos. 473 and 611

SUPPLEMENTAL BRIEF OF WILLIAM S. PRITCHARD, AND JOHN D. HIGGINS, ATTORNEYS FOR GARTH MOTOR COMPANY, CLAIMANT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 115

THE UNITED STATES OF AMERICA,
Petitioner

V.

ONE FORD COUPE AUTOMOBILE, No. 4776501, Alabama License No. 10978, Garth Motor Company,
Claimant.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Re-Argument on Direction of the Court

Argued in October Term, 1925, as Cases Nos. 473 and 611

SUPPLEMENTAL BRIEF OF WILLIAM S. PRITCHARD, AND JOHN D. HIGGINS, ATTORNEYS FOR GARTH MOTOR COMPANY, CLAIMANT

STATEMENT

Having filed the original motion to quash the libel in the Garth Motor Company case and argued the same in the District Court of the United States for the Northern District of Alabama, wherein the motion to quash

the libel was sustained; and having argued the cause in the Circuit Court of Appeals for the Fifth Circuit on appeal, in which court the decree of the District Court was affirmed and to review which decree the instant certiorari was filed; and feeling that the vital issue to a correct determination of this cause has not been clearly set forth in the briefs heretofore filed herein, we take the liberty of filing this short supplemental brief on behalf of the Garth Motor Company, Claimant, which, in our opinion, is decisive of the matter at issue.

The statement of the case heretofore set forth in original brief of counsel is hereby adopted. The matter involved is purely one of law, and in our humble opinion is to be determined on the two following propositions:

PROPOSITION "X"

There was no tax upon illicitly distilled spirits during the month of August, 1923, wherefore, the automobile in question could not have been used for the purpose of depositing and concealing therein illicit distilled spirits, with the intent then and there to defraud the United States of the taxes thereon.

ARGUMENT

The fact that there is no longer a tax upon the liquor involved in this case was definitely decided by this Court on December 11, 1922, in the matter of Regal Drug Corporation vs. Wardell, 260 U. S. 392. Mr. Justice McKenna, delivering the opinion of the court, stated:

"We took pains to say that 'evidence of crime (section 29, Tit. 2) is essential to assessment under section 35', and that we could not 'concede in the absence of language admitting of no other construction, that Congress intended that penalties for crime should be enforced through the secret findings and summary action of executive officers. The guarantee of due process of law and trial by jury are not to be forgotten or disregarded, See Fontenot vs. Accardo, (C. C. A.), 278 Fed. 871. A preliminary injunction should have been granted.'

The comment and decision are applicable here and decisive. *The government concedes that the case is conclusive against the 'penalties and double taxes;' but contends that under tax laws which antedated the National Prohibition Act, only inconsistent laws are repealed, and that taxes in this case were levied under a law not inconsistent. For this Section 35 is adduced. Lipke vs. Lederer (259 U. S. 557; 66 L. Ed. 1061 42 Supreme Court Rep. 549) manifestly precludes the contention.*" (Italics Supplied.)

If prior revenue laws fixing a tax upon liquor were inconsistent with the National Prohibition Act upon December 11, 1922, when the foregoing decision was rendered, they were inconsistent with said Act on November 23, 1921, when the supplemental act, the "Willis-Campbell Act" (42 Stat. 222) was passed. The supplemental act, by its expressed terms merely re-enacted such laws in regard to the manufacture and taxation of and traffic in intoxicating liquor and all penalties for the violation of said laws as were not inconsistent with the National Prohibition Act.

The Government, to say the least of the matter, has been consistent in its contentions; in the instant case its contentions are identical with those which it set up in the Regal Drug Co., case wherefore the decision of this Court in the Regal Drug Co., and the Lipke vs. Lederer cases are the law of this case, upon the question of a tax upon the instant liquor after the adoption of the National Prohibition Act, and are conclusive of the matter at issue. Inasmuch as the Court held that the so-called taxes as set up in the said Prohibition Act, were in truth and in fact a penalty and not a tax, it really leaves nothing further for the Court to consider in the instant case. It might be added that the learned District Judge, Hon. William I. Grubb, before whom this case was originally heard, and who sustained the claimant's contentions herein, allowed the United States Attorney a month in which to show a valid tax, upon the instant liquor, at the time of the seizure of the automobile in question and that the United States Attorney failed to cite a tax that had not by this court been determined to be a penalty, hence he sustained the motion to quash the libel.

PROPOSITION "Y"

Since the enactment of the National Prohibition Act a suit cannot be maintained under Revised Statutes, 3450 (Compiled Statutes 6352) for forfeiture of a vehicle as having been used to remove and conceal distilled spirits, for beverage purposes whereon a double tax (penalty) has been imposed under said Prohibition Act wtih intent to defraud the United States of such tax.

Eighteenth Amendment to the Constitution of the United States.

Lipke vs. Lederer, 259 United States 557.

Regal Drug Corporation v. Wardell, Collector of Internal Revenue, 260 United States 386.

Yuginovich vs. United States, 256 United States 450.

United States vs. Stafoff, et als, 260 United States 477

Gray vs. United States, 276 Fed. 395.

Commercial Credit Company vs. United States (6th C. C. A. 4-6-1925) 5th Fed. Rep. (2nd) Page 1.

United States v. One Haynes Automobile (5th CCA, 7-25-1921), 274 Fed. Rep. 926.

Fontenot, Collector of Internal Revenue, vs. Acardo (5th CCA 2-15-1922) 278 Fed. Rep. 871.

Lewis vs. United States (6th CCA, 4-14-1922), 280 Fed. Rep. 5.

McDowell vs. United States (9th CCA, 2-5-1923) 286 Fed. Rep. 521.

One Ford Touring Car vs. United States, (8th CCA, 10-21-1922), 284 Fed. Rep. 826.

1 Big Six Studebaker Automobile vs. U. S. (9th CCA, May 28, 1923), 289 Fed. 256.

ARGUMENT

The so-called taxes or penalties set forth in section 35 of the National Prohibition Act, are merely additional penalties for the violation of a criminal statute. The Revenue Act, so far as it applies to distilled spirits for beverage purposes, has been repealed by the National Prohibition Act. Liquors can no longer be withdrawn from bond for beverage purposes. If they are withdrawn for such purposes, a crime is committed then and there. The Government here again, just as it did in

the Regal Drug case, seeks to work around the National Prohibition Act to find a tax. It is difficult to see how there could have been any tax on liquor when the National Prohibition Act was adopted, not inconsistent with that Act, that were not by its plain language as heretofore construed by this Court, converted into penalties, and as such continued in force and effect. Inconsistent laws were repealed by said Act. *Inconsistent laws were not re-anacted by the Supplemental Act.*

Respectfully submitted,

WILLIAM S. PRITCHARD, and,
JOHN D. HIGGINS,

210-214 First National Bank Bldg.,
Birmingham, Alabama.

Attorneys for Garth Motor Company,
Claimant.

I hereby certify that I have on this the 13th day of October, 1926, mailed a copy of the foregoing brief, by registered mail, postage prepaid, to Honorable John Sargeant, Attorney General of the United States, Department of Justice Building, Washington, D. C.

William S. Pritchard

Of Counsel for Garth Motor Company,
Claimant.